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IN THE

Supreme Court of the United States

GENE SCROGGY, WARDEN,
Petitioner

versus

EUGENE GALL,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO CERTIORARI PETITION

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE WILLIAMS GALL, JR.,
Petitioner-Appellee,

v. No. 08-6553

GENE SCROGGY, Warden,
Respondent-Appellant

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 87-00056–Danny C. Reeves, District Judge.

Submitted: January 13, 2010
Decided and Filed: April 29, 2010

Before: MARTIN and WHITE, Circuit Judges; ZOUHARY, District Judge.*

COUNSEL

ON BRIEF: Matthew R. Krygiel, OFFICE OFT HE KENTUCKY ATTORNEY GENERAL, Frankfort,

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*The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

Kentucky, for Appellant. Timothy G. Arnold, Jeffrey E. Sherr, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellee.

MARTIN, J., delivered the opinion of the court, in which WHITE, J., joined. ZOUHARY, D. J., delivered a separate dissenting opinion.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. This is Eugene Gall's third appearance in our Court arising out of his 1978 murder conviction and sentence of death in Kentucky state court. Gall was the appellant in his two prior appearances, and his record in that role is one-and-one. In 2000, we reversed the district court's denial of Gall's petition for a writ of habeas corpus, found that Gall's 1978 murder conviction was unconstitutional, and therefore ordered the district court to grant Gall a conditional writ of habeas corpus.

Gall v. Parker (Gall III), 231 F.3d 265 (6th Cir.2000).[1] The condition placed on the writ allowed the Commonwealth either to release Gall or to initiate involuntary civil commitment proceedings due to Gall's extreme and pervasive psychological issues. Then, in 2003, we affirmed the district court's denial of Gall's request for an order compelling the Commonwealth to proceed with involuntary commitment instead of releasing him into the custody of the state of Ohio. *Gall v. Scroggy (Gall IV),* 69 Fed.Appx. 251 (6th Cir.2003).

Here, however, Gall finds himself in the unusual position of defending the district court's decision, as it is the Commonwealth that brings this appeal. After unsuccessfully

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[1] For purposes of clarity, we continue with the numbering system that we adopted in our 2000 opinion granting the conditional writ. 231 F.3d at 278. *Gall I* refers to the decision of the Kentucky Supreme Court affirming Gall's conviction and sentence on direct appeal, *Gall v. Commonwealth,* 607 S.W.2d 97 (Ky.1980), and *Gall II* refers to the Kentucky Supreme Court's opinion denying Gall's request for state habeas relief, *Gall v Commonwealth,* 702 S.W.2d 37 (Ky.1985).

seeking an order from the Kentucky state courts vacating the 1978 conviction and expunging it from his record, Gall again turned to the district court for relief. He sought an order mandating that the Commonwealth vacate the conviction. The district court agreed with Gall, declared that the 1978 conviction was nullified, and directed the Commonwealth to expunge the conviction from Gall's criminal record. *Gall v. Scroggy,* No. 2:87-cv-56, 2008 U.S. Dist. LEXIS 98254 (E.D.Ky. Dec. 4, 2008). The Commonwealth now appeals, and we **AFFIRM.**

I.

In 1978, Gall was convicted in Kentucky state court of raping and murdering a twelve-year-old girl and was sentenced to death. In 2000, though we acknowledged that there was "little doubt" that Gall had committed the horrible crimes with which he had been charged, we conditionally

granted Gall's petition for a writ of habeas corpus due to the Commonwealth's failure to prove an essential element of first-degree murder as it existed at the time in Kentucky law. *Gall III,* 231 F.3d at 277. Recognizing that Gall nevertheless posed a danger to society as a result of his uncontrollable psychological impulses and should never be allowed to rejoin free society, we "condition[ed] the grant of Gall's habeas petition on the state's granting him an involuntary hospitalization proceeding, just as he would have been provided if he had been found insane under Ky.Rev.Stat. Ann. § 504.030 (requiring such a proceeding for defendants who are acquitted by reason of insanity)." *Id.* at 336.[2]

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[2]Thecommitment had to be carried out under Kentucky's involutarily commitment procedures as opposed to voluntary commitment even if Gall acquiesced in the result of institutionalizaiton. This was so because a person who voluntarily commits himself can leave whenever he wants, an unacceptable option given Gall's continued risk to the public.

The Commonwealth sought en banc and Supreme Court review to no avail. The district court thus took the case back up on remand to order the conditional writ and to supervise the release or commitment process. It became apparent during a status conference that the Commonwealth did not intend to initiate involuntary commitment proceedings and, instead, intended to release Gall into the custody of Ohio, where Gall had been convicted of numerous crimes and sentenced to life in prison. *State v. Gall,* 65 Ohio App.2d 57, 415 N.E.2d 1008 (1980) (affirming conviction). Gall understandably preferred to spend the rest of his life in a Kentucky mental hospital instead of an Ohio prison. Thus, in 2001, under the same caption and case number as his original 1987 habeas petition, he moved the district court to enforce our judgment, arguing that our conditional writ essentially amounted to a directive ordering the Commonwealth to

initiate involuntary commitment and that the Commonwealth was powerless to opt to extradite him to Ohio instead.

Gall's 2001 motion to enforce our judgment asked that the district court enter "the attached Final Judgment," a draft order that Gall tendered with his motion. The draft order purported to direct the Commonwealth to proceed with involuntary commitment proceedings and included, among other things, language declaring that his 1978 conviction and death sentence "are unconstitutional and are VACATED." The district court did not adopt Gall's proposed judgment. Instead, for reasons not apparent from the record, it entered its own judgment ordering Gall's release within ninety days, with an additional thirty days if the Commonwealth elected to proceed with civil commitment. Importantly for purposes of this appeal, the district court's judgment did not include

language vacating Gall's 1978 conviction or otherwise addressing its continued presence on his record.

When the Commonwealth released Gall into Ohio's custody, Gall appealed the district court's judgment. His sole argument on appeal was that the district court should have ordered the Commonwealth to proceed with involuntary commitment; he did not raise on appeal the district court's failure to vacate the underlying conviction. Our Court affirmed the district court in 2003. *Gall IV,* 69 Fed.Appx. 251.

After losing his fight to stay in Kentucky, Gall soon moved the Kentucky state court to vacate the conviction. He filed an action in state court in 2004 seeking to have the conviction vacated under Kentucky state procedure. The trial court denied the motion and, in June 2007, the Kentucky Court of Appeals affirmed. *Gall v. Commonwealth,* No.2006-CA-112-MR, 2007 WL 1575303, 2007 Ky.App. Unpub.

LEXIS 10 (Ky. Ct.App. June 1, 2007). The Kentucky Supreme Court denied review in March 2008.

Gall therefore returned to federal court seeking an order directing the Commonwealth to vacate his conviction. Again under the caption of his initial habeas claim, Gall moved to enforce our ruling in *Gall III* declaring the conviction unconstitutional. Gall essentially argued that an unconstitutional conviction is a legal nullity and therefore expungement of the conviction is required. He claims that vacation of his conviction is important because he is set to come before the parole board in Ohio in 2021 and that, in assessing his suitability for parole, a prior murder conviction on his record would be relevant. The Commonwealth opposed Gall's motion on the following theories: (1) that either the district court lacked jurisdiction to grant the motion or that the matter is moot because the Commonwealth has released Gall

in accordance with the writ; (2) venue was improper in federal court in Kentucky because Gall is currently incarcerated in Ohio; (3) Gall failed to show harm flowing from the collateral consequences of the conviction remaining on his record, so his pleadings do not allege injury; (4) Gall either waived his right to or is procedurally barred from seeking to have the conviction vacated; and (5) that notions of federalism, comity, and justice cut against vacating Gall's conviction because neither the Commonwealth nor its courts want to vacate the conviction and because vacating the conviction could aid in Gall's parole in Ohio. Magistrate Judge J. Gregory Wehrman recommended that the court grant Gall's motion and, over the Commonwealth's objection, the district court adopted the magistrate's recommendation in a well-reasoned opinion. The court therefore declared that the conviction was nullified and

directed the Commonwealth to expunge the conviction.[3] The Commonwealth timely appealed.

II.

Though Gall styles his motion as a motion to enforce our judgment in *Gall III*, he brought the motion under the caption of his federal habeas case, and the motion raises substantive questions of the implication of a writ of habeas corpus and the power of a federal court sitting in habeas. We generally review a district court's disposition of a habeas petition de novo and its findings of fact for clear error. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 365 (6th Cir.2006). Questions of law or mixed questions of law and fact are

[3] The district court correctly explained that, although Gall sought an order vacating the conviction, the federal court does not have the authority to vacate a state conviction as vacation is an executory act. Instead, the federal court has the authority to nullify a conviction and to direct that it be expunged. It is by virtue of this expungement order that the state must vacate the conviction. 2008 U.S. Dist. LEXIS 98254.

reviewed de novo. *Ruimveld v. Birkett,* 404 F.3d 1006, 1010 (6th Cir.2005). As this appeal principally concerns legal conclusions regarding the federal court's power to order expungement of a state conviction and policy questions regarding whether the court should exercise that power, we review the district court's decision de novo.

III.

The Commonwealth's arguments on appeal are materially identical to those made before the district court. Prior to addressing these arguments in turn, however, it is useful to review our leading case on the ability of a federal court sitting in habeas to nullify an unconstitutional state conviction.

That case is *Gentry v. Deuth,* 456 F.3d 687 (6th Cir.2006). The issue in *Gentry* was whether a federal court retains jurisdiction over a habeas case for purposes of

declaring a state conviction deemed unconstitutional to be null and void if the defendant is no longer in state custody.[4] On the way to answering in the affirmative, we characterized the expungement of an unconstitutional conviction from one's record as the "essential relief" contemplated by a conditional writ of habeas corpus. *Id.* at 691 ("[T]he court's May 2004 order [granting a conditional writ of habeas corpus ordering either release or retrial within ninety days] implicitly expected that the Commonwealth would vacate the prior judgment pursuant to seeking a new trial, and thus the Commonwealth's failure to seek a new trial effectively circumvented the district court's purpose."); *see also id.* at 695 ("[A] successful habeas challenge to an unconstitutional conviction necessitates relief

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[4] The Commonwealth was also the Appellant in *Gentry*.

not only from any present incarceration arising from that conviction, but also from any collateral consequences thereof. Therefore, Gentry's challenge to the collateral consequences of her conviction was implied by her original petition challenging her conviction as unconstitutional...."). Thus, because a federal court always retains jurisdiction to enforce its lawful judgments, including habeas judgments, the court has the authority to see that its judgment is fully effectuated. This includes the ability to order the state to expunge a conviction. *Id.* at 692, 696-97.

In other words, a habeas petition challenging the constitutionality of a conviction (as opposed to the constitutionality of a particular sentence) challenges both the conviction itself and the resulting confinement and other collateral or incidental consequences stemming from the

conviction. If the petition is well taken, then the necessary remedy is relief from both the direct and collateral consequences of the unconstitutional conviction. It follows that, because ongoing collateral consequences are assumed to flow from an unconstitutional conviction,[5] and because the full relief implied by the writ is the elimination of all direct and collateral consequences, nullification of the conviction and expungement of the conviction from one's record are naturally and necessarily implicit in granting the writ. *Id.* at 696 ("As a practical, logical, and necessary matter, relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively requires expungement of

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[5]As for the presence of collateral consequences stemming from a felony conviction, we explicitly stated, "[w]ith respect to injury, an essential element of a live controversy, the law does not require a habeas petitioner to prove by a preponderance of the evidence that she may face collateral consequences of her unconstitutional felony conviction, for the disabilities consequent to a felony conviction are legion, and patently obvious in many cases." *Id.* at 694.

the conviction from the petitioner's record, and expungement of the record implies nullification of the unconstitutional conviction."). Indeed, as a general proposition, we know of no authority or plausible rationale indicating that states ever have a substantive justification to keep an unconstitutional conviction on an individual's record, and we find it telling that the Commonwealth has not cited a single case of a state successfully maintaining an unconstitutional conviction on the record of a petitioner seeking its removal. The only question is whether the state takes care of the ministerial function of expungement of its own accord or whether it insists that the habeas petitioner affirmatively request expungement.

Having thus reviewed *Gentry*, we believe that the majority of the Commonwealth's arguments in this case are plainly foreclosed by this prior precedent.

A. The district court retained jurisdiction to consider and grant Gall's motion.

Just as it did in *Gentry,* the Commonwealth argues that the district court no longer has habeas jurisdiction because Gall has been released from the custody of the Kentucky prison. And just as it was in *Gentry,* the Commonwealth is incorrect.

In support of its argument, the Commonwealth cites *Gentry* for the proposition that "when a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter." (Appellant's Br. at 9 (citing *Gentry,* 456 F.3d at 692).) The Commonwealth proceeds to argue that it met the terms of Gall's conditional writ by releasing him to the state of Ohio, so the habeas court lost jurisdiction at that time. In relying upon this statement, the

Commonwealth reveals a misreading of *Gentry*[6] and a fundamental misunderstanding of the concept of conditional writs of habeas corpus.

As we explained in *Gentry*, "the sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life," and, thus, "[c]onditional grants of writs of habeas corpus are final orders ... exactly like absolute grants, and they ordinarily and ideally operate automatically, that is, without the need for the district court to act further."

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[6]Indeed, the Commonwealth misreads *Gentry* in almost all relevant respects. That case is unequivocally contrary to the Commonwealth's position yet the Commonwealth continues to cite *Gentry* in support of its position. Thus, although this case is materially identical to *Gentry* in all respects save for one procedural issue, we cannot summarily affirm for the reasons stated in *Gentry* because the Commonwealth appears so fundamentally to misunderstand the reasons stated in *Gentry*

456 F.3d at 692. An absolute writ immediately provides the petitioner the right to relief from all direct and collateral consequences of the unconstitutional conviction. A conditional writ places a hold on that right pending the state's exercise of the option allowed by the conditional writ but, if the state does not exercise the option, the conditional writ converts into an absolute writ, complete with the right to relief from all direct and collateral consequences. *Id.* The federal court retains jurisdiction to afford that relief until the unconstitutional judgment is gone. *Eddleman v. McKee,* 586 F.3d 409, 413 (6th Cir.2009).

In *Gentry,* as in the case of most conditional writs, the option was for the state to retry the defendant. Because it

failed to exercise that option, the writ became absolute.[7] The same is generally true in this case, the only difference being the nature of the condition placed on the writ. The option provided the Commonwealth by the conditional writ was to initiate involuntary commitment proceedings. When it failed to exercise that option, the writ became absolute. Thus, as in *Gentry,* the federal court retains jurisdiction to effectuate and enforce the judgment encompassed by the now-absolute writ provided that all other requisites for federal jurisdiction, such as a live case or controversy, are also present.

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[7] "As Gentry had been released from prison prior to the district court's order, the Commonwealth obviously had no duty under the district court's order to take any action with respect to her person. However, Gentry's status as a convicted felon apparently remained in force, as the Commonwealth did not nullify her conviction, and thus her January 2005 motion reasonably asked the court to enforce its order by making the conditional writ absolute Therefore, we find that the district court retained jurisdiction to enforce its conditional grant of a writ of habeas corpus." 456 F.3d at 692.

B. Venue was proper in the United States District Court for the Eastern District of Kentucky.

The Commonwealth next argues that, because Gall is currently incarcerated in Ohio and because the harm of the alleged collateral consequences would come to fruition in Ohio, he must seek vacation of the Kentucky conviction, if anywhere, in Ohio. However, as the district court correctly reasoned, Gall's request for vacation of the conviction is necessarily tied to his original petition for a writ of habeas corpus. Because venue was proper in the Eastern District of Kentucky for Gall to bring his habeas petition originally, 28 U.S.C. § 2241(d), so too is venue proper in that district to seek enforcement of that court's judgment on the petition.

C. Gall adequately alleges injury.

The Commonwealth further argues that Gall has no

pled with sufficient particularity that he is suffering any injury from the conviction's remaining on his record. Ongoing or future harm is a prerequisite for the existence of a case or controversy, a necessary requirement for the continued existence of federal habeas jurisdiction. *Gentry*, 456 F.3d at 693 (describing the evolution of the case or controversy requirement in habeas cases). Because Gall maintains that the conviction will affect his proceedings before the Ohio parole board, and because that hearing will not occur until at least the year 2021, the Commonwealth claims that he is not currently suffering any injury in fact. In this regard, the Commonwealth does not seem to dispute that the conviction will be relevant to the decision of the Ohio parole board and, instead, seems to argue simply that the alleged injury is too far in the future to give rise to the injury necessary to establish a case or

controversy. This argument misunderstands the nature of the collateral consequences flowing from an unconstitutional felony conviction and elevates form over function.

First, we summarily found in *Gall IV* that Gall continued to suffer from collateral consequences in 2003 even though he had already been transferred to Ohio. *Gall IV,* 69 Fed.Appx. at 253. Though we did not state explicitly what those collateral consequences were, we nevertheless found that they were present. Additionally, our decision in *Gall IV* necessarily did not alleviate those collateral consequences because we denied Gall any relief. As nothing has changed since our 2003 opinion, it would seem to follow that the collateral consequences still exist.

Even if we had not already decided the collateral consequences issue in *Gall IV,* we held in *Gentry* that

collateral consequences are essentially presumed simply by virtue of the unconstitutional conviction's continued existence. *Gentry,* 456 F.3d at 694-95. Thus, once a habeas petitioner provides the minimal showing of the existence of collateral consequences that we found to be required in *Gentry,* it becomes the state's burden to show conclusively that collateral consequences do not exist in a case of an unconstitutional conviction remaining on one's record. This makes perfect sense when viewed in context-a felony conviction is a scarlet letter placed upon an individual by the state that carries with it consequences that we have described as "legion" and "patently obvious." *Id.* at 694. Though it seems settled that the mere presence of the conviction is not, in and of itself, sufficient injury to give rise to a case or controversy, it is equally settled by *Gentry* that a petitioner need not show much

more than the possibility of tangible collateral consequences for the burden to shift to the state to show that the consequences are not in fact possible. *See also Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) ("In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur).").

In this case, the Commonwealth has not proven to our satisfaction that the 1987 conviction will have no possible

effect on the Ohio parole board's consideration.[8] Indeed, in its brief on appeal, the Commonwealth admits that, although it

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[8] It is on this point that our dissenting colleague primarily disagrees. The dissent contends that (1) this is not the typical case in which we may presume collateral consequences such as inability to vote or own a firearm because Gall continues to be a felon due to the Ohio convictions and (2) the Ohio Parole Board will still consider the strong evidence of Gall's guilt of murder, and almost certainly deny parole on that basis, even if there is no conviction to confirm that guilt, and so finds the case to be moot. The dissent is certainly correct as to the first contention insofar as this is not a typical habeas case, and it argues persuasively (much more so, we note, than did the Commonwealth) as to the second contention. But nowhere in the authorities is it suggested that the presumption of collateral consequences applies only in typical habeas cases, so the presumption applies here. It is thus the Commonwealth's burden to establish conclusively that the collateral consequences will not come to pass, a task that the Commonwealth has not, and likely could not, accomplish. Furthermore, the dissent's reasoning-that because parole is unlikely under the unique facts of this case, there is a lack of injury sufficient to allow the anomalous result of an unconstitutional conviction remaining on one's record-could have dangerous implications even in a typical habeas case. It is possible that the next person seeking to have an unconstitutional conviction removed from her record is very unlikely ever to own a firearm, or had no prior record of ever voting. Surely we would not say that there is no ongoing injury just because this person was unlikely ever to exercise the rights that would be restored after the conviction were erased. It is for this very reason that the presumption of collateral consequences exists.

doubts that the 1987 conviction will impact the parole hearing due to the presence of other felony convictions, "it is impossible to know how this prior conviction will be handled until Gall comes up for parole." (Appellant's Br. at 16.) Furthermore, despite its expressed doubt as to the presence of collateral consequences, we note that the Commonwealth has mounted a vigorous defense over an issue that it would have us believe is meaningless. We are satisfied of the continued existence of collateral consequences sufficient to give rise to a case or controversy.

We also disagree with the notion implied in the Commonwealth's argument that Gall should simply wait until the day of his parole hearing gets closer to bring this challenge. As stated above, the Commonwealth has not shown that the conviction will be completely irrelevant to his parole

hearing. We can find no compelling reason to delay addressing what will be an issue at some point, and we find it particularly ironic that the Commonwealth argues here that Gall should wait when, as we will see, the Commonwealth argues later that Gall has waited too long.

D. Gall has not waived or procedurally defaulted on his right to request nullification and expungement of the 1978 conviction.

The Commonwealth contends that Gall waived or defaulted on his right to seek relief from the federal courts regarding expungement of the 1978 conviction. The basis for this argument is that Gall briefly raised the issue in the district court in connection with his motion to enforce in *Gall IV* and did not press the issue on appeal. This is easily the Commonwealth's strongest argument in this case as it is the only aspect of this case that is materially distinguishable from

Gentry. Indeed, as we have already mentioned, we can imagine no reasonable substantive argument in support of a state maintaining an unconstitutional conviction on an individual's record, so the only way for a state to obtain this result legally is to rely upon an individual litigant's procedural foot-faults. In this case, however, we do not find Gall's actions to be procedurally faulty, and certainly not sufficiently so as to justify the anomalous result of an unconstitutional conviction remaining on Gall's record.

We begin with the observation made above, and that we made in *Gentry*, that a conviction declared unconstitutional by a court of competent jurisdiction becomes a legal nullity at the moment that the judgment becomes final. *See Gentry*, 456 F.3d at 697 ("[A] state acts *ultra vires* when it obtains a criminal conviction in violation of the United States

Constitution, and *ultra vires* acts bear no legitimate force in a government under the law. A public act without legitimate force is indistinct under the law from an act that never was, or an act that has been voided."). And, as we stated above, the expungement of a conviction is a necessary consequence of that conviction having been declared unconstitutional, so the only remaining matter is the purely administrative step of erasing the conviction from the records. Although the federal courts certainly have the *authority* to order a state to take this ministerial step, we do not see it as being the federal courts' *responsibility* to do so. Ideally, the state would expunge the conviction of its own accord, but we recognize that bureaucracy often and innocently gets in the way of the ideal and efficient operation of government. We therefore assume that the state courts would, upon request, follow up and order

the removal of an unconstitutional conviction as a matter of course and without protestation. Furthermore, we do not believe our thinking on this point to be novel or unreasonable. If a state conviction is declared unconstitutional, the state, either by itself or by order of its courts, should expunge the conviction, and the federal courts should not be called upon to exercise the paternalistic function of directing the state to do that which it necessarily must do.

With these general principles in mind, we turn to Gall's case. As we just said, it would not have been unreasonable for Gall to assume that the best place to seek to have his state conviction expunged was the court of the state where he had been convicted. And, indeed, Gall did just that when, in 2004, he asked the Kentucky state court to vacate his conviction under state procedural rules. For their own reasons, the

Commonwealth's courts declined to provide Gall the relief to which he is entitled, but we nevertheless do not fault Gall for directing his request to the state courts.

This leaves only the question whether Gall's failure to argue the issue of expungement on appeal in *Gall IV* precludes him from asking the federal courts to order expungement now. Viewing the pleadings at issue in *Gall IV,* it is clear that the primary issue was whether the Commonwealth had the authority to decline our invitation to initiate civil commitment proceedings and to opt instead to release Gall into the custody of Ohio. The vacation of Gall's 1978 conviction is not mentioned at all in the body of his motion to enforce our judgment. Instead, vacation of the conviction is only raised by language in Gall's proposed final judgment that he tendered along with his moving papers proclaiming that his conviction was unconstitutional and vacated.

We find it highly material that expungement of the conviction was not the subject of Gall's motion in 2001 and, instead, was only fleetingly mentioned in a proposed final judgment. Had expungement of the conviction been the actual subject of the motion, then Gall's failure to press the point on appeal might preclude him from raising the issue in the future. But the issue was only raised in a proposed order, which parties submit almost as an afterthought and which courts often disregard without ever even looking at them. Stated differently, that the district court declined to enter the proposed final judgment submitted by Gall does not necessarily imply that the court substantively considered whether to order expungement of the conviction and decided against it; it could just as easily mean that the court never looked at the proposed order because it prefers to prepare its own orders or because it was denying the

relief that was the focus of the proceedings. Thus, vacation of the conviction appearing in the proposed order indicates, at most, a belief on Gall's part that the federal court had the power to nullify the conviction, a belief we later confirmed in *Gentry*. But, as we stated above, neither before nor after *Gentry* is it unreasonable for a litigant to believe that the best and most direct way to have an unconstitutional state conviction expunged from one's record is to ask the state to do so.[9] In sum, (1) because expungement of the conviction was not truly at issue in *Gall IV*,

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[9] At issue in *Gentry* was merely the question whether thefederal courts have the authority and jurisdiction to order the state to expunge an unconstitutional conviction. In the course of answering those questions in the affirmative, we held that a petitioner need not "exhaust" his state court remedies seeking expungement before asking that the federal court order expungement. 456 F.3d at 695-96. That holding applies with equal force going the opposite direction-a petitioner may seek expungement from the state courts in the first instance without waiving his or her ability later to seek this relief from the federal court.

(2) because we find no indication that the district court substantively considered and rejected the suggestion in the proposed order to direct expungement of the conviction, and (3) because Gall quite reasonably believed that he could and should seek this relief from the state courts, we find no procedural fault in Gall's decision to not raise the issue on appeal in *Gall IV* and to opt instead to seek relief from the state courts.

E. Delay does not preclude Gall from now seeking expungement.

In a related argument, the Commonwealth contends that the delay between Gall's motion to enforce in 2001 and his motion to enforce in 2008 bars his ability to seek expungement. The Commonwealth actually makes this argument twice, first under the guise of procedural waiver and later under a theory akin to equitable estoppel. We reject each argument.

As we noted above, we find it irreconcilable that the Commonwealth argues both that Gall has waited too long to seek relief and that he must wait until closer to his 2021 parole hearing to seek relief. As to the waiver-by-delay theory, we have already stated that Gall's litigation strategy of first seeking relief from the state courts, a process which took approximately four years, does not result in a waiver of his right to return to the federal courts. As to the estoppel-by-delay theory, the record is clear that Gall was not simply sitting on his hands all this time. He was first fighting the Commonwealth's decision to turn him over to the custody of Ohio and then spent four years in state court seeking expungement of the conviction. We therefore find that the passage of time does not, in this case, preclude or affect Gall's right to seek expungement of the conviction.

F. Neither comity nor the ends of justice bar expungement of the conviction.

The Commonwealth argues that notions of comity and justice should prevent Gall from having the conviction expunged from his record. As to comity, the Commonwealth argues that the state court declined to exercise its equitable powers to vacate the conviction and that the federal courts should therefore defer to the state court's reasoning and conclusions. In its briefing, the Commonwealth correctly summarizes the Kentucky Court of Appeals's decision to deny Gall relief as resting on three main points: "deference to the federal courts [sic] failure to grant such relief in 2001, Gall's procedural default of this issue in his subsequent appeal, and the specific circumstances of Gall's case (and reversal)-including Gall's factual guilt for manslaughter." (Appellant's Br. at 24-25.) On the first point, as we have already noted, we do not understand the federal court in 2001 to have

made a substantive decision on the expungement issue. Thus, as there was no federal decision on the issue to which the state should have deferred, we see no justification for completing the circle by deferring to the state court's deference to the federal court. On the second point, we have already rejected the procedural default argument and see no comity-based justification for deferring to what amounts to a state court's prediction of how a federal court will apply its own procedural rules for purposes of procedural default. On the third point, the fact that Gall may actually be guilty of manslaughter[10] is

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[10] In *Gall II*, we noted that because the Commonwealth had failed to prove that Gall lacked extreme emotional disturbance at the time of the murder-an element of first-degree murder in Kentucky at the time of Gall's conviction-the most that could be said was that the Commonwealth had established all of the elements of the lesser offense of manslaughter. However, the statutory maximum sentence for manslaughter under Kentucky law was twenty years, and Gall had already served more than twenty years in prison by the time we issued our decision in *Gall III*. Thus, double jeopardy barred the Commonwealth from re-prosecuting Gall for manslaughter. 231 F.3d at 335-36. Accordingly, though Gall may be factually guilty of manslaughter, the Commonwealth has never convicted him of that crime.

irrelevant because the fact remains that he has a legally void murder conviction on his record. There is no legal support for the notion that Gall should have a conviction on his record, so any conviction-regardless of its lack of constitutional justification-will do. Finally, separate and apart from the Kentucky court's rationales, we see no compelling justification to accord any comity- or federalism-based deference to the state court in this case when the central question is the scope and effect of a federal court's judgment.

The Commonwealth's final argument is that, given our statements in *Gall III* that Gall presents a continued risk of danger to society and should "never be allowed to become a free member of the society again," 231 F.3d at 336, we should not order expungement of the conviction when doing so may aid in Gall becoming a free member of society again. While this

argument may have a superficial political or moral appeal, we nevertheless find it legally unpersuasive. The Commonwealth convicted Gall of murder in violation of the Constitution, and our system does not recognize the concept of a conviction being only a little bit unconstitutional. It either is or is not; there is no middle ground from which the state may continue in a Kafka-esque manner to hold certain aspects of the conviction over the petitioner's head.[11] Instead, the necessary and unescapable result of finding a conviction unconstitutional is that the conviction must be expunged and certainly may not be used in any manner

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[11] In *The Trial*, Franz Kafka described a totalitarian state in which the judicial system was used to suppress freedom. One of the techniques used was non-final "acquittals." Kafka describes these "acquittals" as follows: "That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again." Franz Kafka, *The Trial* 158 (Willa & Edwin Muir, trans., Alfred A. Knopf, rev. ed.1992).

that would be adverse or prejudicial to the petitioner. Although the Commonwealth is free to continue to disagree with our decision in 2000, the decision is final and binding and the Commonwealth has no authority to disregard it. The Commonwealth declined and instead transferred Gall to Ohio to serve prison time on different charges. This was the Commonwealth's decision, not ours and not Gall's, and we assume-indeed hope-that the Commonwealth made the decision with full understanding of the possibility of parole. Having made its decision, the Commonwealth cannot now complain of its consequences and certainly may not seek to impose unconstitutional effects on Gall in order to negate its perhaps ill-considered decision.

IV.

For the reasons set forth above, we **AFFIRM** the decision of the district court.

DISSENT

JACK ZOUHARY, District Judge. Under the peculiar circumstances of this case, the relief Gall seeks will be of no consequence, and this appeal is therefore moot.

The mootness doctrine derives from Article III's case-or-controversy requirement, which "subsists through all stages of federal judicial proceedings, trial and appellate." *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (internal quotation omitted). "The parties must continue to have a personal stake in the outcome of the lawsuit." *Id.* For habeas suits, once a petitioner is no longer incarcerated, some other "concrete and continuing injury ...-some 'collateral consequence' of the conviction-must exist if the suit is to be maintained." *Id.*

(citing *Carafas v. LaVallee*, 391 U.S. 234, 237-38, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968)).

There is a well-recognized presumption that wrongful criminal convictions carry collateral consequences. *See, e g., Gentry v. Deuth*, 456 F.3d 687, 694-95 (6th Cir.2006) ("[T]he disabilities consequent to a felony conviction are legion, and patently obvious in many cases."). However, that presumption is rebuttable,Document1zzB013120218700920 and determining whether continuing habeas jurisdiction exists requires examination of the circumstances of a given case. *See, e g., Perez*

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01 One panel of the Ninth Circuit has held that the presumption of collateral consequences flowing from criminal convictions is irrebuttable, *Chacon v. Wood*, 36 F 3d 1459, 1463 (9th Cir 1994), but this holding has been criticized even within the Ninth Circuit, *Larche v. Simons*, 53 F 3d 1068, 1070-71 (9th Cir 1995), and no other circuit has signed on to the Ninth Circuit's position

In the instant case, the majority would require the Commonwealth to "establish conclusively that the collateral consequences will not come to pass " Maj Op at 355, n 8 This approach would make the presumption of collateral consequences effectively irrebuttable Overcoming the presumption will admittedly be rare, but the Commonwealth has done so here

v. Greiner, 296 F.3d 123, 125-26 (2d Cir.2002) (finding no material possibility that [the petitioner] will suffer collateral consequences on the basis of the challenged conviction" where the petitioner was already permanently ineligible to return to the United States because of his conviction on an unrelated drug charge).

In this case, Gall is incarcerated in Ohio on convictions for rape, attempted rape, and aggravated burglary unrelated to the Kentucky murder conviction he wants wiped off the books. The normal presumption of collateral consequences-quite appropriate in cases where the petitioner is actually released-does not hold here. This is not a case where the petitioner is a free citizen who suffers certain and obvious disabilities as a result of his status as a convicted felon. Rather, Gall's freedom is restricted for reasons wholly apart from the unconstitutional Kentucky conviction, and

the relief he currently seeks will do nothing to change his status as an Ohio prisoner.

The sole collateral consequence claimed by Gall is the possible effect of the Kentucky murder conviction on the decision of the Ohio Parole Board when he becomes eligible for parole eleven years from now. But parole decisions are not made simply by tallying the number of past convictions on a prisoner's record. The Ohio Parole Board has broad discretion to grant or deny parole "if in its judgment there is reasonable ground to believe that ... paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev.Code § 2967.03. In making this determination, the Parole Board "may investigate and examine ... [the prisoner's] mental and moral qualities and characteristics ... and any other matter[ ] affecting [the prisoner's] fitness to be at

liberty without being a threat to society." *Id.* This statutory language (as well as common sense) allows the Parole Board to consider Gall's entire history-both legal and factual-in determining his suitability for parole. The Parole Board's broad discretion in this regard is reflected in the former Ohio Parole Guidelines, which specifically provided that "[i]f a conviction found to be [constitutionally] invalid is nonetheless supported by persuasive information that the offender committed the criminal act, this information may be considered as a negative indicant of parole prognosis[.]" OHIO PAROLE BOARD GUIDELINES MANUAL, Part C, § A.7 (3d ed. July 1, 2007).[2]

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[2] *Available at* http:/ /www. drc. ohio. gov/ web/ Guideline Manual 07. pdf. On April 1, 2010, those Guidelines were rescinded by the Parole Board, in favor of an approach that gives the Board even more discretion to consider relevant facts in an individual prisoner's case. *See* OHIO PAROLE BOARD HANDBOOK, pp. 2-3 (April 1, 2010), *available at* http // www drc ohio. gov/ web/ Parole% 20Board% 20Handbook% 204-1-2010% 20(2).pdf.

Gall's history includes "overwhelming" evidence that he killed Lisa Jansen, *Gall III,* 231 F.3d at 281, as well as evidence of extreme emotional disturbance-the reason this court found his conviction to be unconstitutional, *id.* at 336.

This court properly granted Gall habeas relief, while noting that it was "evident that Eugene Gall was the man who cut [Lisa Jansen's] life short," *id.* at 277, and that "he would be extremely dangerous to his fellow citizens if released," *id.* at 336. It is naive to think the Parole Board would fail to consider the factual history of Gall's Kentucky case, *whether or not* his record contains an official notation of that conviction. Indeed, the Parole Board would be remiss if it overlooked the strong evidence of violence and emotional instability underlying Gall's conviction. And Gall cannot create a case or controversy simply by hoping the Board might fail to discover his background. The Ohio Parole Board will have before it the facts underlying the Kentucky case

and the published opinion in *Gall III* showing the murder conviction was invalid.

In short, Gall has no current dispute with the Commonwealth that would make any difference in his status as an Ohio inmate or otherwise. The Ohio Parole Board can properly investigate and consider both the facts underlying Gall's Kentucky conviction and the ruling in *Gall III*. Future discretionary decisions that depend on the underlying facts of a case, rather than the legal label placed on the outcome, do not support a finding of collateral consequences. *Cf. Lane v. Williams*, 455 U.S. 624, 632-633, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982) (voiding a record of a parole violation has little practical effect on discretionary decisions by employers or sentencing judges, who are influenced more by the conduct

underlying the violation than by the official record of the violation).

As the above discussion suggests, the mootness analysis here is not controlled by *Gentry v. Deuth*. In *Gentry*, unlike this case, the petitioner had been released from custody prior to her request for expungement. 456 F.3d at 694-95. Noting the presumption of collateral consequences that applies in such circumstances, as well as the numerous Kentucky statutes that would affect her as a convicted felon, the *Gentry* court held that there was sufficient injury to avoid mootness. *Id.* In other words, her record of conviction had obvious consequences for her as a free citizen. In this case, by contrast, Gall faces no collateral consequences as a result of his conviction, as there is no practical possibility that expungement of the 1978 conviction will affect his release from the Ohio prison system. Under Ohio law and the

Parole Guidelines, the Parole Board has broad discretion to consider the Kentucky murder even if the conviction was invalid.

The majority glides over this critical analysis by simply adopting this court's *Gall IV* conclusion that Gall suffers from collateral consequences. But that was then, this is now, and there is an important difference. Gall had a clear stake in the outcome of *Gall IV,* unlike the present dispute. His position in *Gall IV* was that the Commonwealth was ***required*** to institute civil commitment proceedings, and that his extradition and incarceration in Ohio were therefore inappropriate. Incarceration and civil commitment are entirely distinct circumstances, and thus Gall had a concrete interest in litigating *Gall IV.* But once this court ruled on that issue, Gall's dispute with the Commonwealth was over for all practical purposes.

Moreover, the majority should not assume this case matters simply because the Commonwealth has vigorously opposed Gall's request for expungement. Regardless how loud or strident the protests from either party, federal courts must always inquire into the threshold issue of jurisdiction. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation omitted). No matter the din, the relief Gall seeks here is of no consequence.

Because this case is moot, I would not reach the question of whether federal habeas law required the district court to order

expungement of the 1978 conviction. Nonetheless, a few comments are appropriate.

This case has a convoluted history stemming from varied efforts to balance the unconstitutionality of Gall's conviction with his potential danger to the public if released. In *Gall III*, this court struck that balance by conditioning habeas relief on the Commonwealth initiating civil commitment proceedings. The Commonwealth chose a different path by extraditing Gall to Ohio-an action this court did not anticipate but nevertheless found permissible in *Gall IV*.

In the current round of this dispute, the majority gives no thought to balancing Gall's entitlement to habeas relief with the potential danger of his release. Instead, the majority simply declares that a conviction "either is [constitutional] or is not; there is no middle ground from which a state may continue in a

Kafka-esque manner to hold certain aspects of the conviction over the petitioner's head." Maj. Op. at 358. Such a rhetorical flourish obscures the difference between relief from Gall's unconstitutional conviction and consideration of his mental instability for purposes of parole. Indeed, the *Gall III* court was perfectly willing to hold Gall's mental instability over his head by expecting him to be civilly committed. A habeas court can and should consider public safety in order to fashion relief "as law and justice require." 28 U.S.C. § 2243.

Regardless, in this case, the question is academic, as ordering expungement will not make a bit of difference. The federal courts have had their say, several times over, and Gall's future is now in the hands of the Ohio Parole Board, which may properly consider Gall's actions in Kentucky. I would hold that this case is moot and, accordingly, respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

EUGENE WILLIAMS GALL, JR.,

Petitioner — Civil Action No. 2:87-56-DCR

V.

GENE SCROGGY, Warden, — **MEMORANDUM OPINION AND ORDER**

Respondent.

*** *** *** ***

This matter is before the Court for consideration of Petitioner Eugene Gall's motion to enforce the Sixth Circuit's October 30, 2000 decision, which directed this Court to grant Gall's writ of habeas corpus on the basis that his 1978 Kentucky murder conviction was unconstitutional.[1]

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[1] *Gall v. Parker*, 231 V.3d 265 (6th Cir. 2000).

[Record No. 185] Consistent with local practice, the matter was referred to United States Magistrate Judge J. Gregory Wehrman ("Magistrate") for consideration pursuant to 28 U.S.C. § 636(b)(1)(B).[2] The Magistrate Judge filed his Report and Recommendation on October 15, 2008. [Record No. 196] Based on his review of the record and the applicable law, the Magistrate Judge recommended that this Court grant Gall's motion. [Record No. 196, p.18–19]

The Kentucky Attorney General's Office filed objections to the Report and Recommendation on November 3, 2008. [Record No. 199] Gall's response was filed on

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[2]On April 22, 2008, United States Senior District Judge William O. Bertelsman recused himself from further participation in the case. The matter was reassigned to the undersigned on the same date. [Record No. 186]

December 1, 2008. [Record No. 202] Having reviewed the record and relevant law de novo, the Court will adopt the Magistrate Judge's recommendation. As a result, the Court's ruling will nullify Gall's 1978 Kentucky murder conviction and direct that the conviction be expunged from his record.

I. BACKGROUND

On September 30, 1978, Gall was convicted in a Kentucky state court of murdering Lisa Jansen while engaged in the commission of rape. After finding no mitigating circumstances in the punishment phase, the jury recommended the death penalty. The state court adopted this recommendation and sentenced Gall to death. *See Gall v. Parker*, 231 F.3d 265, 278 (6th Cir. 2000).

After exhausting all state court remedies,[3] this Court denied Gall's petition for habeas corpus. On appeal, the Sixth Circuit reversed this Court's holding and held that pervasive error at trial led to an unconstitutional conviction, and that double jeopardy prevented Kentucky from retrying Gall for Jansen's murder. The matter was remanded to this Court with instructions to grant Gall's habeas petition. However, concerned that Gall "would be extremely dangerous to his fellow citizens if released," the Sixth Circuit instructed this Court to condition the grant of the habeas corpus on permitting time for Kentucky to conduct an involuntary

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[3] Gall's conviction was upheld by the Supreme Court of Kentucky, *Gall v Commonwealth*607 S.W 2d 97 (Ky. 1980), *cert.denied*, 450 U S. 989 (1981), and subsequent state post-conviction relief was denied. *Gall v Commonwealth*, 702 S.W. 2d 37 (Ky. 1985).

hospitalization proceeding. *Id.* At 278, 335-36; [Record No. 196, p.2]

The Report and Recommendation lays out the subsequent chronology of events leading up to the present motion:

> On remand to this court, Gall moved for a judgment vacating his conviction. This court's judgment of August 15, 2001 did not include Gall's tendered language expressly vacating the underlying conviction, but instead granted the petition of writ of habeas corpus by ordering the release of the petition within ninety (90) days, conditioned on the retention of the petitioner for an additional 30 days should the Commonwealth "elect to initiate civil commitment proceedings against the petitioner." Ultimately, the Commonwealth chose not to proceed with involuntary hospitalization proceedings. Instead, Gall was released from custody in Kentucky pursuant to this Court's April 15, 2001 order and extradited to Ohio to serve sentences for rape, attempted rape, and aggravated robbery convictions in that jurisdiction.

Gall again appealed this court's judgment to the Sixth Circuit, arguing that the August 15, 2001 order should have mandated an involuntary hospitalization proceeding. The Sixth Circuit disagreed and affirmed the judgment of the court, holding that the state was not required to provide Gall with an involuntary commitment proceeding. *Gall v. Scroggy*, 69 Fed. Appx. 251, 254 (6th Cir. 2003).

Gall next returned to state court, filing a motion under Kentucky CR 60.02 which argued that his underlying judgment of conviction should be vacated in order to comply with the October [30], 2000 ruling of the Sixth Circuit which granted the writ of habeas corpus. The circuit court denied Gall's motion and the Kentucky Court of Appeals affirmed on the grounds that the August 15, 2001 judgment of the federal court demonstrated an intent not to vacate the underlying state conviction. The Kentucky Court of Appeals further noted that Gall's appeal of the August 15, 2001 order never raised the issue of whether the conviction should be vacated, instead focusing solely on the involuntary commitment issue. The Kentucky Supreme Court denied discretionary review on March 12, 2008, whereupon Gall promptly filed a new motion in this court seeking an order vacating the 1978 conviction pursuant to the grant of the writ.

[Record No. 196, p. 2]

In his motion to enforce, Gall argues that although the grant of habeas corpus remedied his wrongful custody in Kentucky, he still suffers from the collateral consequences of the conviction. Accordingly, he requests that this Court vacate the October 6, 1978, state murder conviction. [Record No. 185]

In response, the Attorney General argues that this Court should not grant Gall's requested relief for the following reasons: (1) this Court lacks jurisdiction (or the issue is moot) since Gall's petition for habeas corpus has already been granted; (2) this is an improper venue since Gall is currently an inmate in Ohio; (3) Gall's pleadings are insufficient because he fails to show how he is prejudiced by the collateral consequences of the conviction; (4) Gall is procedurally

barred or has waived his right to bring this claim; and (5) the principles of federalism and justice weigh against this Court's vacating Gall's state court conviction. [Record No. 194]

In his Report and Recommendation, Magistrate Judge Wehrman made findings regarding: (1) Jurisdiction/Venue; (2) Procedural Default; (3) Appropriate Relief; and (4) "Broader Issues of Justice." [Record No. 196] He then recommended that "petitioner's motion to enforce the judgment of the Sixth Circuit and this court's previous grant of writ of habeas corpus be granted, and that the district court enter an order forthwith nullifying the unconstitutional 1978 conviction and requiring the Commonwealth of Kentucky to expunge the same conviction from its records." [*Id.*, p. 18–19] The Attorney General has objected to all the Magistrate's findings and his ultimate recommendation. [Record No. 199]

In his reply, Gall also raises several objections regarding the Magistrate Judge's legal conclusions. [Record No. 202]

II. STANDARD OF REVIEW

This Court must make a *de novo* determination of those portions of a magistrate judge's recommended disposition to which an objection is made. 28 U.S.C. § 636(b)(1)(C). Since the Attorney General objects to all the Magistrate Judge's findings and his ultimate recommendation, the undersigned will review the entire matter *de novo*.

III. ANALYSIS – PROCEDURAL ISSUES

A. This Court's Jurisdiction Over the Matter

The Magistrate Judge found that this Court has jurisdiction, because "[u]nder Sixth Circuit case law and generally understood principles of habeas corpus, a court retains jurisdiction to enforce its own prior judgment."

[Record No. 196, p. 3] The Attorney General argues that this Court relinquished its jurisdiction, because its judgment was completed when the Commonwealth of Kentucky released Gall from its custody. [Record No. 199, pp. 6–7] The Magistrate Judge and the Attorney General rely on the same opinion to support their opposing conclusions regarding whether this Court has jurisdiction.

In May 2004, the federal district court in the Western District of Kentucky issued a conditional grant of habeas corpus to Carrie Gentry after holding that violations of her Sixth Amendment right to confrontation resulted in an unconstitutional conviction. *Gentry v. Deuth*, 456 F.3d 687, 690–91 (6th Cir. 2006). In January 2005, Gentry returned to district court and filed a motion to enforce the May 2004 judgment, and to have her unconstitutional conviction voided

so that she would not be subjected to the collateral consequences faced by convicted felons.[4] *Id.* at 691. The district court responded by converting the conditional grant of habeas into an absolute grant and nullified Gentry's conviction. *Id.* The subsequent appeal to the Sixth Circuit was "essentially predicated on a technical legal issue – whether the district court possessed jurisdiction over the motion to enforce and the authority to nullify the Commonwealth's conviction. *Id.*

The Sixth Circuit held that the federal district court retained jurisdiction to nullify Gentry's conviction even though she had already been released from prison. *Id.* at 697. In reaching this conclusion, the court noted that, "a federal

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[4] *Gentry v Deuth*, 381 F. Supp. 2d 634 (W.D. Ky. July 21, 2005).

district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case," but "when a state meets the terms of the habeas court's condition, the habeas court does not retain any further jurisdiction over the matter." *Id.* at 692 (citations omitted). The court also noted that:

> [T]he law is absolutely clear that the writ [of habeas corpus] releases the successful petitioner from the state's custody, and, as we have discussed above, such release includes relief from the conviction's collateral consequences when it was the conviction itself that was found to be unconstitutional. As a practical, logical, and necessary matter, relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively requires expungement of the conviction from the petitioner's record, and expungement of the record implies nullification of the unconstitutional conviction.

Id. at 696 (citations omitted). Essentially, the court held that

relief from the collateral consequences of an unconstitutional conviction is implicit in a grant of habeas corpus relief.[5] Since Gentry was still subjected to the collateral consequences of her unconstitutional conviction, the judgment was not complete. Thus, the district court retained jurisdiction.

Based on the reasoning in *Gentry*, whether a district court actually intended for relief from collateral consequences to be part of its judgment appears to be irrelevant. The Sixth Circuit held that relief from collateral consequences is implicit in a grant of habeas corpus based on an unconstitutional conviction. Thus, a judgment is not fulfilled if, after being released, a petitioner is still subjected to collateral

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[5] *See Id.* at 693–94 (*citing Sibron v. New York*, 392 U.S. 40 (1968); *Carafras v. LavVallee*, 391 U.S. 234 (1968); *Abela v. Martin*, 380 F.3d 915 (6th Cir. 2004); *Green v. Arn*, 839 F.2d 300 (6th Cir. 1988)).

consequences stemming from the unconstitutional conviction. Since Gall's release from Kentucky custody did not alleviate the effects of the collateral consequences of his conviction, this Court retains jurisdiction over this matter until its judgment is fully enforced.

Additionally, because Gall is still affected by the collateral consequences of his unconstitutional conviction, his motion is not moot. *See Carafas v. Lavallee*, 391 U.S. 234, 239 (1968) (the expiration of a sentence does not render a habeas petition moot if the petitioner is still affected by the collateral consequences of the conviction).

B. Proper Venue

Gall has been an inmate in the Ohio prison system since his release from Kentucky's custody in November 2001. Because Gall is currently incarcerated in Ohio, the Attorney

General contends that the Eastern District of Kentucky is the improper venue to handle this motion. [Record No. 199, p. 9–10] However, because Gall seeks relief from collateral consequences of an unconstitutional Kentucky conviction, and because a habeas grant implicitly includes such relief, the Eastern District of Kentucky remains a proper venue for this action. *See* 28 U.S.C. § 2241(d) (noting that the Eastern District of Kentucky was the proper jurisdiction to bring the habeas petition in initially).

C. Sufficiency of the Pleadings

The Attorney General also argues that Gall's pleadings are insufficient because he has not made any showing that he is prejudiced by the collateral consequences stemming from his Kentucky conviction. [*Id.*, p. 7–9] The Attorney General

contends that although *Gentry* stood for the proposition that prejudice need not be shown by a preponderance of evidence because of the presumption of collateral consequences, at least a minimal showing is still required. [*Id.*, p. 8] The Attorney General claims that the possibility that Gall would be adversely affected by the Kentucky conviction remaining on his record when he is up for parole in 2021 is too remote; therefore, Gall has not demonstrated even a minimal showing of prejudice. [*Id.*, p. 8–9]. Essentially, the Attorney General argues that there is no showing of any actual injury, and as a result, no case or controversy is presented.

To meet the case-or-controversy requirement, parties must have a personal stake in the outcome of the lawsuit at all stages of the proceedings. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (citations omitted). "This means that, throughout the

litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* While in custody, the case-or-controversy requirement is always satisfied. *Id.* However, if the petitioner's sentence has expired, "some concrete and continuing injury other than the now-ended incarceration or parole – some 'collateral consequences' of the conviction – must exist if the suit is to be maintained." *Id.* (citation omitted).

In *Spencer*, the Supreme Court noted that "[i]n recent decades we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur)." *Id.* at 8 (parentheses are original) *citing Sibron v. New York*, 392 U.S.

40, 55 (1968) ("The Court thus acknowledges the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'").

First, it should be noted that the Sixth Circuit already addressed this issue in its June 13, 2003 opinion:

> [W]hile a substantial argument can be made that the case is moot because Gall was granted habeas corpus relief and has been released from Kentucky's custody, we conclude that collateral consequences still exist, and that a case or controversy exists with respect to whether this court's earlier opinion and judgment were fulfilled.

Gall, 69 Fed. Appx. At 253. Second, the Attorney General's own arguments expressly acknowledge the prejudicial effect of the collateral consequences. In addressing why the tenets

of justice do not require this Court to grant Gall's request relief, the Attorney General asserts that:

> Ultimately, when Gall becomes parole eligible in Ohio, his "risk" will be assessed by a review of his criminal history. Nullifying this conviction from Gall's record would create an unnecessary risk to the general public (and women in particular). Justice dictates the circumstances of Gall's life be fully assessed when calculating risk – and nullification of this conviction eliminates such risk.
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> * * *
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> [T]he Respondent has continued to oppose Gall because of a belief that this action was more than about enforcing the rule of law or concern over Gall's future right to vote or drive a car. As was confirmed by Gall in his Reply, this is about Gall wanting to get out of prison when he comes up for parole – [an] unfathomable prospect that was acknowledged by the Sixth Circuit when habeas relief was granted. Therefore, by continuing these efforts, the Respondent has attempted to ensure that Gall's horrible crimes against Lisa Jansen will not go unnoticed when the Ohio Parole Board assesses whether Gall should be paroled from his Ohio prison.

* * *

> [T]he Respondent's efforts are part of an ongoing duty to protect society from Gall. It is because of unfortunate errors in the legal process that Gall's convictions related to crimes against Lisa Jansen were overturned. Nevertheless, when assessing his future dangerousness/risk to the public, the existence of this case should remain a factor to be utilized in determining whether he is entitled to be released.

[Record No. 199, p. 15–17]

By making these arguments, the Attorney General acknowledges that collateral consequences exist, *and* expressly advocates that these collateral consequences should have a negative effect on Gall in the future. Therefore, the Attorney General's earlier argument (i.e., that Gall's pleadings are insufficient because they fail to show any prejudice) is simply illogical. In short, Gall's pleadings are sufficient to meet the case-and-controversy requirement.

D. Procedural Default

In his Report and Recommendation, the Magistrate Judge found that Gall was not procedurally defaulted from bringing his motion to enforce. [Record No. 196, p. 4–8] In support of this conclusion, the Magistrate Judge stated that:

> Three factors preclude a finding of procedural default on the facts of this case notwithstanding the passage of eight years following the Sixth Circuit's opinion: 1) the lack of state or federal law concerning the procedure to be followed to nullify or expunge a state court conviction following a federal grant of habeas relief; 2) the timing of the Sixth Circuit's decision in *Gentry* in 2006 during the pendency of Gall's state court proceedings; and 3) petitioner's continual pursuit of a state court remedy followed by a prompt post-*Gentry* pursuit of a remedy in this court. This is not a case where the petitioner sat on his hands. After the Kentucky Supreme Court denied discretionary review on March 12, 2008, petitioner's counsel filed the instant motion just one month later.

> The lone factor in favor of procedural default is that when Gall first appealed this court's August 15, 2001 judgment, he raised only the issue of the failure [of] Kentucky to mandate involuntary commitment proceedings. In theory[,] Gall could have challenged this court's failure to include his tendered language "vacating" the underlying conviction at the time, but did not.

[Record No. 196, p. 6–7]

The Attorney General objects to this finding, contending that "Gall procedurally defaulted this issue when he failed to raise it in his previous appeal of this Court's Judgment (dated August 15, 2001), and also because he waited until April 15, 2008 to raise this issue via the motion to enforce in this Court." [Record No. 199, p. 10] In support of this argument, the Attorney General argues that: (1) the authority to provide relief from collateral consequences of an unconstitutional conviction was not newly available to federal

courts after *Gentry* in 2006, but had been established in *Carafas* in 1968; (2) Gall's attorney argued and won *Gentry*, so he should have known to bring this action in federal court instead of spending four years seeking redress in state court; and (3) Gall did not "continually pursue" this action, because he waited 2 ½ years to file any claim even though the claim of error was, or should have been apparent, when the August 15, 2001 judgment did not include Gall's tendered language to vacate his conviction. [Record No. 199, pp. 10–13]

The Attorney General's primary argument is that federal courts' power to provide relief from collateral consequences was not initially established by *Gentry*. Rather, the *Gentry* Court relied on *Carafas*, which reached a similar holding nearly 40 years earlier. [Record No. 199, pp. 10–11] *See Carafas*, 391 U.S. at 237–39 (holding that the habeas

statute "does not limit the relief that may be granted to discharge of the applicant from physical custody, and that the statute's mandate is broad with respect to the relief that may be granted").

Although *Carafas* discusses both collateral consequences of a conviction and the broadness of the relief available under the habeas statute, the Supreme Court did not hold that a federal court could nullify a state conviction to provide relief from the collateral consequences of an unconstitutional conviction. The Supreme Court's holdings in *Carafas*, and then in *Sibron*, established that the habeas corpus statute provides relief from both direct and collateral consequences. However, it was not until *Gentry* that authority existed specifically holding that federal court nullification of a state conviction is the appropriate remedy for a habeas

petitioner suffering from the collateral consequences of an unconstitutional conviction. *See Gentry*, 456 F.3d at 696–97. Since the availability of this remedy in federal court had not been determined until *Gentry*, Gall is not faulted for seeking relief in state court prior to *Gentry*. The Magistrate Judge reached the same conclusion:

> [I]n 2001 when Gall appealed the order granting habeas relief, it was not clear that this federal court would be required to expressly nullify the conviction. Given Gall's release from state custody based upon a finding that the underlying conviction was unconstitutional, it was arguably reasonable for Gall to assume that nullification was *implied* (as later held by *Gentry*) and that the conviction would be set aside by the state without additional action on his part. At most, Gall might reasonably have believed that he would be required to pursue expungement through a state court proceeding. When it became clear that the Kentucky conviction would remain unaltered and that collateral consequences would continue to flow form that conviction, Gall sought relief in the state court.

> *Gentry* was decided in July 2006 while Gall's appeal of the denial of relief by the state court was still pending. In *Gentry*, the Sixth Circuit affirmed the relief sought by Gall in the case *sub judice* – an order enforcing previously granted habeas relief through nullification of the underlying conviction, to avoid the imposition of collateral consequences upon the (released) prisoner-petitioner by the Commonwealth of Kentucky. Prior to *Gentry*, no case law illuminated the course of remedy to be pursued where a petitioner had been awarded habeas relief and released from imprisonment, but remained subject to collateral consequences due a state's decision to imposed them on the basis of an unconstitutional conviction that remained "on the books." Thus, although a petitioner seeking nullification of his conviction after *Gentry* might be faulted for first pursuing a remedy in state court, on the facts of this case I can find no procedural default.

[Record No. 196, pp. 7–8]

The Attorney General's second and third objection to the Magistrate's findings also fail. First, it is true that Timothy Arnold, one of Gall's current attorney, successfully argued for

the remedy of federal nullification of a state conviction in *Gentry*. However, Arnold was not assigned to Gall's case until this current motion was filed on April 15, 2008.[6] [Record Nos. 184, 187] The fact that different Kentucky Department of Public Advocacy ("KDPA") attorneys represented Gall in state court while Arnold, assigned by the KDPA to represent Gentry, litigated her similar claim in federal court is meaningless. Thus, there is no merit to the Attorney General's argument that if Arnold and the KDPA believed that federal court was the proper forum for a remedy in *Gentry*, then they

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[6] This Court granted Gall's motion to substitute Timothy Arnold and Jeffrey Sherr as counsel in place of Edward Monahan and Erwin Lewis on April 22, 2008. [Record No. 187] Arnold and Sherr were assigned to Gall's case for federal proceedings by the Kentucky Department of Public Advocacy. [Record No. 184]

should not have spent four years pursuing a state court remedy in Gall's case. Second, the Attorney General's claim that Gall waited two and one-half years before filing any claim is incorrect. This Court's August 15, 2001, judgment did not become final until the Sixth Circuit's decision in *Gall v. Scroggy* on June 13, 2003. Gall began pursuing relief from the collateral consequences of the conviction in state court less than a year later. *Gentry* was decided while Gall's claim for relief was still pending before the Kentucky Court of Appeals. Thirty days after denial of relief was finalized in state court, Gall filed this motion. As the Magistrate Judge correctly notes, "[t]his is not a case where the petitioner sat on his hands." [Record No. 196, p. 6]

For the reasons discussed above, the Court adopts the Magistrate's findings and holds that Gall is not procedurally

barred from bringing the present motion.

IV. ANALYSIS – SUBSTANTIVE ISSUES

A. The Petitioner is Entitled to Relief from Collateral Consequences

As previously discussed, the Supreme Court held in *Carafas* that the habeas corpus statute authorizes federal courts to relieve the direct and collateral consequences of a unconstitutional conviction when granting a writ of habeas corpus. *Carafas*, 391 U.S. at 239. In his Report and Recommendation, the Magistrate Judge recommends nullifying Gall's state court conviction to relieve Gall from the collateral consequences associated with his unconstitutional conviction. [Record No. 196, pp. 13–19] The Attorney General opposes this recommendation and argues that the "tenets of justice do not require granting Gall any additional

relief." [Record No. 199, p. 13–17]

The Attorney General's primary objection is that despite its October 30, 2000, judgment instructing this Court to grant Gall's petition for habeas corpus, the Sixth Circuit clearly intended to prevent Gall from getting an opportunity to be released and re-offend. As the Attorney General notes, "Gall is now hoping to use the Sixth Circuit's opinion, the same opinion that sought to keep him permanently institutionalized, as a tool to facilitate his release." The Attorney General also argues that Gall would receive no tangible benefits from having this conviction nullified, because he has several other legitimate felony convictions that will also impose collateral consequences on him. Finally, the Attorney General argues that this Court should consider Gall's factual guilt in determining whether to nullify his conviction.

[Record No. 199, pp. 14–17] For the reasons discussed below, the Court will adopt the Magistrate Judge's recommendation and nullify Gall's state conviction over the Attorney General's objections.

The Attorney General is correct in asserting that the Sixth Circuit intended to prevent Gall's release into the general public.

> [I]n looking at the trial record, we think that the overwhelming and undisputed evidence of Drs. Chutkow and Toppen was that Gall was not sane at the time he committed the acts in question. Moreover, the evidence clearly showed that Gall's psychotic condition is permanent, and that he would be extremely dangerous to his fellow citizens if released into free society. Dr. Noelker testified to Gall's dangerousness in the starkest terms. He stated that Gall's condition was not curable, and "the best that we can hope to do would be to control his condition." Outside of an institution, he explained, this is not possible; "we would have no means of knowing how or when he took his medication or what pressures would cause him to be psychotically obsessional." In an

uncontrolled setting, therefore, it was "probable that [Gall] would act again in a similar manner" to the grisly act committed in this case. It was therefore his "strong recommendation" that Gall "never be allowed to become a free member of the society again." In 1983, he repeated his diagnosis that Gall would always suffer from a mental disease or defect. At trial, Dr. Toppen reached the same conclusion, explaining the need for Gall to remain in a highly structured environment, whether that be a mental or penal institution. A 1991 examination by another doctor confirmed that Gall is permanently dangerous (concluding that Gall's violent propensities "appear to be the result of a brain dysfunction which unleashes, without apparent internal control, violent and aggressive behavior").

With this overwhelming showing of Gall's severe mental illness and his high potential for future dangerousness, we condition the grant of Gall's habeas petition on the state's granting him an involuntary hospitalization proceeding. . . . *[W]e can only hope that the Commonwealth will note the overwhelming evidence that this man is severely mentally ill and highly dangerous and commit him indefinitely on that basis.*

Gall, 231 F.3d at 336 (internal citations omitted) (emphasis added).

On remand to this Court, a judgment was entered directing Kentucky to release Gall from its custody within 90 days, but granted the state an additional 30 days custody if it elected to initiate civil commitment proceedings as suggested by the Sixth Circuit. *Gall*, 69 Fed. Appx. at 252. Instead of seeking involuntary[7] commitment of Gall within the prescribed time period, Gall was extradited to Ohio to serve

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[7] Gall *wanted* to be committed in Kentucky rather than incarcerated in Ohio. However, the proceeding would still have been "involuntary" in the sense that he would have been committed by the state and, therefore, would be unable to secure his own release from the mental institution.

time for rape, attempted rape, and aggravated robbery. *Id.* at 253. Gall appealed his release to Ohio, but the Sixth Circuit held that Kentucky was not required to provide him an involuntary commitment proceeding rather than release him. *Id.* 253.

The Attorney General argues that this Court should not grant Gall's relief, because the Ohio Parole Board should be able to use the Kentucky conviction in determining whether to grant Gall's parole. This argument is unpersuasive. This Court (per Judge Bertelsman) provided Kentucky with the opportunity to maintain control of Gall when it granted his habeas petition – involuntary commitment. However, Kentucky rejected this opportunity and relinquished custody of Gall to the Ohio Department of Corrections. As a result, Kentucky gave up the interest it had in controlling Gall's

confinement when it chose to hand him over to Ohio rather than civilly commit him in the Commonwealth. Whether Gall is granted parole in 2021 or at some later date is a matter for the Ohio Adult Parole Authority to decide. *See* OHIO REV. CODE § 2967.02.

The Attorney General also argues that Gall would not receive a tangible benefit if his requested relief was granted, because he would still be burdened by the collateral consequences of other legitimate felony convictions. Essentially, the argument is that Gall's claim is moot, because a favorable judgment is unlikely to provide tangible relief. Whether a petitioner's multiple offender status renders relief from the collateral consequences of one conviction moot has not been addressed by the Sixth Circuit as far as the undersigned can determine. However, the Court agrees with

the Magistrate Judge's analysis and holds that Gall's multiple offender status does not render his motion moot.[8]

Finally, Gall's factual guilt cannot be taken into consideration by this Court in its determination of whether to nullify the conviction. This Court does not doubt either the Sixth Circuit's or the Attorney General's contention that Gall

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[8] *See Sibron*, 392 U.S. at 56 (finding "no relevance in the fact that Sibron is a multiple offender" based in part upon the inability to predict whether other convictions could be set aside in the future); *Harrison v Indiana*, 597 F.2d 115, 118 (7th Cir. 1979) (noting that the Supreme Court has clearly held that "a petitioner's status as a multiple offender does not so affect the collateral consequences as to render moot his attack on any one conviction); *Murray v Wainwright*, 450 F.2d 465, 468 (5th Cir. 1971) (multiple offender status is irrelevant to mootness determination); *Velez v. New York*, 941 F. Supp. 300, 308–09 (E.D.N Y. 1996) (same). *Cf. Malloy v. Purvis*, 681 F.2d 736, 739 (11th Cir 1982) (holding that a claim for relief from collateral consequences is moot where petitioner is a multiple offender).

is factually guilty of murdering Lisa Jansen. However, the At
General is aware that a person is not legally guilty unless
proven to a jury beyond a reasonable doubt. *See In re Winshi*
U.S. 358 (1970). The Sixth Circuit determined that
conviction was unconstitutional and that double jeopardy pre
Kentucky from ever legally convicting Gall of her m
Therefore, this Court must consider only Gall's current legal .

Based upon the Sixth Circuit's holding that Gall's conviction was unconstitutional, Kentucky cannot continue to impose collateral consequences on Gall stemming from that unconstitutional conviction. Accordingly, the Court adopts the Magistrate Judge's conclusion that relief should be granted.

B. Appropriate Manner of Relief

Gall seeks an order "finding the October 6, 1978 judgment of the Boone Circuit Court to be void, and directing

that it be *vacated*." [Record No. 185, p. 8] (emphasis added). As the Magistrate Judge correctly concludes, a federal district does not have the authority to *vacate* a state conviction. [Record No. 196, p. 9] However, the Court has the authority, and may be required, to *nullify* and direct *expungement* of a state court conviction after a habeas writ is granted.[9] [Record No. 196, pp. 9–13]

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[9] The relevant case law distinguishes between the *nullification* and/or *expungment* of a state court conviction by a federal district court, and the *vacatur* or *reversal* of such a conviction. Therefore, it is important to define the terms:

1) Nullification – "The act of making something void" or "The state or condition of being void"
2) Expungment – "The removal of a conviction . . . from a person's criminal record "
3) Vacatur – "The act of annulling or setting aside" or "[a] rule or order by which a proceeding is vacated."
4) Reversal – "An appellate court's overturning of a lower court's decision."

BLACK'S LAW DICTIONARY (8th ed 2004).

In denying Gall's requested relief in state court, the Kentucky Court of Appeals found it was "highly significant for the purposes of the present appeal that the district court chose **not** to include [Gall's tendered language that his conviction be vacated] in its [August 15, 2001] order granting habeas relief to Gall." *See Gall v. Commonwealth*, 2007 WL 1575303, at *2 (Ky. App. 2007) (emphasis original). The Kentucky Court of Appeals held that *Gentry* stood for the proposition that federal district courts had the authority to vacate a state conviction, and that this Court's failure to include Gall's tendered language amounted to purposeful choice not to vacate his state conviction. *See Gall*, 2007 WL 1575303, at *3.

Gentry did not hold that a federal district court has the authority to *vacate* a state criminal conviction. Rather, the court held that the district court acted within its constitutional

authority when it *nullified* Gentry's unconstitutional state conviction. In so holding, the court noted:

> [T]he law is absolutely clear that the writ releases the successful petitioner from the state's custody, and, as we have discussed above, such release includes relief from the conviction's collateral consequences when it was the conviction itself that was found to be unconstitutional. As a practical, logical, and necessary matter, relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively *requires expungment of the conviction from the petitioner's record, and expungement of the record implies nullification of the unconstitutional conviction.*

Gentry, 456 F.3d at 697 (emphasis added). Thus, *Gentry* makes clear that habeas relief from an unconstitutional conviction implies nullification and expungement of the conviction, and that a federal district court has the authority to later make explicit what is implicit in its grant of habeas relief.

Additionally, the *Gentry* Court clarified its holding by noting that:

> In so holding, however, we note that the fact that the writ *nullifies* the criminal conviction does not necessarily *reverse* that conviction, for the writ does not itself generally preclude the Commonwealth from retrying the petitioner if it can otherwise do so lawfully. Nullification is thus akin to a non-prejudicial dismissal.

Id. at 697 (emphasis original) (citations omitted). Since double jeopardy barred re-prosecution of Gall for murder, his grant of habeas corpus implied nullification, which therefore, was akin to a dismissal with prejudice in this case.

Gall's motion requests vacatur, not nullification. Under Kentucky Law, upon motion a court may relieve a party from its final judgment if the judgment "is void, or has been satisfied, released, or discharged, or the prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application." KY. R. CIV. P. 60.02(e) This Court agrees with the Magistrate Judge that since nullification renders a conviction void, Gall will receive the same relief from nullification that he would if this Court had the authority to vacate the sentence.

Based on the Magistrate Judge's analysis of *Gentry*, he recommended that this Court should enter an order nullifying and directing expungement of the underlying 1978 conviction. [Record No. 196, p. 12] After a thorough review *de novo*, this Court adopts the Magistrate Judge's recommendation to nullify the conviction and to direct that the conviction be expunged from Gall's record.

V. CONCLUSION

Based upon the foregoing analysis, it is hereby **ORDERD** as follows:

(1) The Report and Recommendation of the Magistrate Judge filed October 15, 2008 [Record No. 196] is **ADOPTED** and **INCORPORATED** herein by reference.

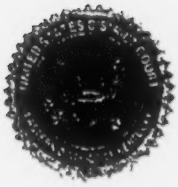
(2) The objections to the Magistrate Judge's Report and Recommendation are **OVERRULED**.

(3) Petitioner Eugene William Gall, Jr.'s motion to enforce the Sixth Circuit's October 30, 2000 judgment [Record No. 185] is **GRANTED**;

(4) Petitioner Eugene William Gall, Jr.'s Kentucky conviction for the murder of Lisa Jansen is **NULLIFIED**; and

(5) The Commonwealth of Kentucky is directed to **EXPUNGE** the above-referenced conviction from Eugene William Gall, Jr.'s criminal record.

This 4th day of December, 2008.



Signed By:

Danny C. Reeves DCR

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL NO. 87-56-DCR

EUGENE WILLIAMS GALL, JR.,
PETITIONER

vs.

GENE SCROGGY, WARDEN, RESPONDENT

REPORT & RECOMMENDATION

On October 6, 1978, Eugene Williams Gall, Jr. was convicted by the Commonwealth of Kentucky in Boone Circuit Court of the gruesome murder of a twelve year old girl and sentenced to death. Thirty years later, the ramifications of that long-ago conviction continue to vex both state and federal courts. The defendant's latest

salvo in his continuing quest to vacate his original conviction is a "motion to enforce" a decision of the Sixth Circuit issued on October 30, 2000 which ordered this federal district court to grant the petitioner a writ of habeas corpus on the basis that the conviction was unconstitutional.

Pursuant to local practice, defendant's current motion has been referred to the undersigned magistrate judge for initial consideration and a report and recommendation. *See* 28 U.S.C. §636(b). I now recommend that the limited additional relief sought by defendant be granted because it is required by this court's prior absolute grant of habeas corpus relief.

I. Procedural History

The unique procedural history of this case was

summarized in this court's order of May 1, 2008 and is repeated here for the convenience of the court:

> [A] fter exhausting his available state court remedies, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in this court. Although his petition was initially denied, the Sixth Circuit reversed and remanded on October 30, 2000, on the basis that constitutional error had so infected the trial as to require a conditional grant of the writ. *Gall v. Parker*,

Id. at 336.

> On remand to this court, Gall moved for a judgment vacating his conviction. This court's judgment of August 15, 2001 did not include Gall's tendered language expressly vacating the underlying conviction, but instead granted the petition of writ of habeas corpus by ordering the release of the petitioner within ninety (90) days, conditioned on the retention of the petitioner for an additional 30 days should the Commonwealth "elect to initiate civil

commitment proceedings against the petitioner." Ultimately, the Commonwealth chose not to proceed with involuntary hospitalization proceedings. Instead, Gall was released from custody in Kentucky pursuant to this court's August 15, 2001 order and extradited to Ohio to serve sentences for rape, attempted rape, and aggravated robbery convictions in that jurisdiction.

Gall again appealed this court's judgment to the Sixth Circuit, arguing that the August 15, 2001 order should have mandated an involuntary hospitalization proceeding. The Sixth Circuit disagreed and affirmed the judgment of this court, holding that the state was not required to provide Gall with an involuntary commitment proceeding. *Gall v. Scroggy*, 69 Fed. Appx. 251, 254 (6th Cir. 2003)(unpublished, text available on Westlaw).

Gall next returned to state court, filing a motion under Kentucky CR 60.02 which argued that his underlying judgment of conviction should be vacated

in order to comply with the October 20, 2000 ruling of the Sixth Circuit which granted the writ of habeas corpus. The circuit court denied Gall's motion and the Kentucky Court of Appeals affirmed on the grounds that the August 15, 2001 judgment of this federal court demonstrated an intent not to vacate the underlying state conviction. The Kentucky Court of Appeals further noted that Gall's appeal of the August 15, 2001 order never raised the issue of whether the conviction should have been vacated, instead focusing solely on the involuntary commitment issue. The Kentucky Supreme Court denied discretionary review on March 12, 2008, whereupon Gall promptly filed a new motion in this court seeking an order vacating the 1978 conviction pursuant to the grant of the writ.

The current motion does not specifically refer to the statute or federal rule on which it is based. Although a petition for writ of mandamus is one remedy which may be employed to enforce a judgment, petitioner instead relies on *Gentry v. Deuth*, 456 F.3d 687

(6th Cir. 2006), *cert. denied*, 2006 WL 3227209 (Dec. 11, 2006). In *Gentry*, the Sixth Circuit held that federal courts retain continuing jurisdiction to enforce conditional writs of habeas corpus granted pursuant to 28 U.S.C. §2254, including but not limited to the power "to nullify an unconstitutionally obtained state court conviction." *Id.* at 696. Therefore, petitioner relies upon *Gentry* to assert this court's continuing jurisdiction pursuant to 28 U.S.C. §2254 to enforce the conditional grant of the writ directed by the Sixth Circuit Court of Appeals on October 30, 2000.

In his current proceeding, Gall is ably represented by counsel from the Department of Public Advocacy in Frankfort, Kentucky.

Doc. 193.

II. Analysis

A. Jurisdiction/Venue

The Kentucky respondent first argues that: 1) this case is moot and the court lacks jurisdiction because Gall has been released by the Commonwealth of Kentucky; and 2) the petition should have been filed in Ohio where Gall is currently incarcerated. Neither argument is persuasive.

It is true that petitioner is no longer in the custody of Kentucky. However, the continuation of Warden Scroggy as the respondent stems from the assertion of this court's continuing jurisdiction under 28 U.S.C. §2254 and the fact that petitioner seeks an order enforcing the Sixth Circuit's judgment concerning a Kentucky conviction prior to his release

from incarceration in Kentucky. Under Sixth Circuit case law and generally understood principles of habeas corpus, a court retains jurisdiction to enforce its own prior judgment. *See Gentry v. Deuth*, 456 F.3d 687, 692-693 (6th Cir. 2006)(rejecting argument that release of the person renders moot an underlying habeas proceeding challenging an unlawful conviction); *see also Salem v. Yukens*, 2006 WL 3500629 (E.D. Mich. Dec. 6, 2006)(unpublished, text available on Westlaw). Similarly, jurisdiction over the original petition is not destroyed upon the subsequent transfer of a prisoner to another jurisdiction so long as jurisdiction was proper at the time the petition was filed. *See Bishop v. Med. Superintendent of the Ionia State Hosp.*, 377 F.2d 467, 468 (6th Cir. 1967).

B. Procedural Default

The Kentucky respondent additionally argues that Gall has procedurally defaulted any claim to have his conviction expunged because "[e]ight years have passed since the Sixth Circuit's opinion that invalidated Gall's murder conviction." The respondent's argument relies primarily if not exclusively on the passage of time. Although the issue of procedural default is a relatively close one due to factors other than the passage of time alone, I conclude that Gall has adequately pursued his current claim.

The denial of Gall's petition for writ of habeas corpus was overturned by the Sixth Circuit on October 30, 2000. Following remand to this court, on August 15, 2001 the presiding district judge granted the writ

of habeas corpus and ordered Gall's release. Because retrial on the same criminal charge was barred by double jeopardy, the grant of the writ of habeas corpus could have been absolute. However, following the Sixth Circuit's instructions, the judgment of the district court permitted the Commonwealth to retain custody of Gall for the limited purpose of initiating *civil* commitment proceedings.

Prior to entry of judgment on remand, Gall tendered an order that included language which stated in relevant part that "[p]etitioner's conviction for murder and sentence of death....are unconstitutional and are VACATED." In lieu of using the tendered order, the district court fashioned its own order and entry of judgment as follows:

> Pursuant to the opinion and judgment of the United States Court of Appeals for the Sixth Circuit..., the petition for writ of habeas corpus under 28 U.S.C. 2254 regardin g the petitioner's judgment of conviction for the murder of Lisa Jansen in the Circuit Court of Boone County, Kentucky is hereby GRANTED, and the Commonwealth of Kentucky shall discharge petitioner from custody under that judgment within ninety (90) days of the entry of judgment in this case.
>
> The petitioner's release from state custody under the judgment is subject to the condition that the Commonwealth of Kentucky may retain custody of petitioner for an additional 30 days hereafter if it elects to initiate civil commitment proceedings...within that time.

Doc. 169. When Kentucky failed to initiate civil commitment proceedings, Gall was released to Ohio

to begin serving sentences on convictions in that jurisdiction.

Gall timely appealed the August 15, 2001 order of this court, arguing that Kentucky should have been required to conduct the referenced involuntary hospitalization proceeding. Notably, Gall did not at that time raise the issue of whether the underlying Kentucky conviction should have been vacated. The Sixth Circuit rejected Gall's argument concerning the sole issue raised, holding on June 13, 2003 that Kentucky was not required to conduct an involuntary hospitalization proceeding.

On May 18, 2004, Gall began to pursue additional relief in state court under CR 60.02(e) seeking the relief he now seeks in this court - an order vacating his underlying conviction in compliance with the grant of the writ of habeas corpus previously obtained. The state

circuit court denied Gall's motion on August 23, 2005 and Gall appealed.

During the pendency of Gall's CR 60.02 proceedings in state court, a wholly separate case bearing procedural similarities to Gall's case was progressing through this federal court. In *Gentry v. Deuth*, 456 F.3d 687 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 838 (2006), the petitioner invoked the continuing jurisdiction of this federal court to order nullification of her Kentucky conviction following the grant of habeas relief. In *Gentry*, the Kentucky respondent (represented by the same counsel as in this case) argued that the federal court lacked jurisdiction and that Gentry should instead file a CR 60.02 motion in state court - the precise procedural route contemporaneously pursued by Gall.[1] On July 31, 2006 -while Gall's CR 60.02 proceeding was still pending before the Kentucky Court of

Appeals- the Sixth Circuit Court of Appeals issued its opinion in *Gentry*, holding that a petitioner who had been granted habeas relief could invoke the continuing jurisdiction of the federal court that had granted relief in order to obtain the

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[1]Ironically, Gentry's counsel also represented Gall, but in Gentry argued (with ultimate success) that the federal court retained continuing jurisdiction to expunge the conviction because such relief was implied in an order granting habeas relief.

additional implied relief of nullification of his state court conviction.

Three factors preclude a finding of procedural default on the facts of this case notwithstanding the passage of eight years following the Sixth Circuit's opinion: 1) the lack of state or federal law concerning the procedure to be followed to nullify or expunge a state court conviction following a federal grant of habeas relief; 2) the timing of the Sixth Circuit's decision in *Gentry* in 2006 during the pendency of Gall's state court proceeding; and 3) petitioner's continual pursuit of a state court remedy followed by a prompt post-*Gentry* pursuit of a remedy in this court. This is not a case where the petitioner sat on his hands. After the Kentucky Supreme Court denied discretionary review on March 12, 2008,

petitioner's counsel filed the instant motion just one month later.

The lone fact in favor of procedural default is that when Gall first appealed this court's August 15, 2001 judgment, he raised only the issue of the failure of Kentucky to mandate involuntary commitment proceedings. In theory Gall could have challenged this court's failure to include his tendered language "vacating" the underlying conviction at the time, but did not. The Kentucky Court of Appeals emphasized the point in denying relief: "Gall's subsequent appeal of that district court order never raised this issue [the district court's failure to adopt his language vacating the conviction], instead focusing exclusively on whether the involuntary hospitalization proceeding was mandatory." *Gall v.*

Commonwealth, 2007 WL 1575303 at *3 (Ky. Ct. App. 2007)(unpublished, text available on Westlaw).

The Kentucky court's emphasis of this point ignores several salient facts. First, as explained below neither *Gentry* nor any other case has ever held that a federal court should *vacate* a state court conviction when granting relief under 28 U.S.C. §2254, as opposed to "nullifying" a conviction. Therefore, Gall would have had no basis to appeal the court's failure to adopt his tendered language "vacating" his state court conviction.

In addition, in 2001 when Gall appealed the order granting habeas relief, it was not clear that this federal court would be required to expressly nullify the conviction. Given Gall's release from state custody based upon a finding that the underlying conviction was unconstitutional, it was arguably reasonable for Gall to

assume that nullification was *implied* (as later held by *Gentry*) and that the conviction would be set aside by the state without additional action on his part. At most, Gall might reasonably have believed that he would be required to pursue expungement through a state court proceeding. When it became clear that the Kentucky conviction would remained unaltered and that collateral consequences would continue to flow from that conviction, Gall sought relief in the state court.

Gentry was decided in July 2006 while Gall's appeal of the denial of relief by the state court was still pending. In *Gentry*, the Sixth Circuit affirmed the relief sought by Gall in the case *sub judice* - an order enforcing previously granted habeas relief through nullification of the underlying conviction, to avoid the imposition of collateral consequences upon the (released) prisoner-

petitioner by the Commonwealth of Kentucky. Prior to *Gentry*, no case law illuminated the course of remedy to be pursued where a petitioner had been awarded habeas relief and released from imprisonment, but remained subject to collateral consequences due to a state's decision to impose them on the basis of an unconstitutional conviction that remained "on the books." Thus, although a petitioner seeking nullification of his conviction after *Gentry* might be faulted for first pursuing a remedy in state court, on the facts of this case I can find no procedural default.

No doubt the dearth in case law prior to *Gentry* regarding the correct procedural remedy has much to do with the rarity of the issue, since the writ of habeas corpus is seldom granted. When it is granted, typically the grant is a conditional one that permits re-trial within

a reasonable amount of time. Only if a state fails to meet the specified conditions does the writ become absolute and require release of the unconstitutionally convicted prisoner.

C. Appropriate Relief: Nullification, Expungement, Vacatur and Reversal

Having determined jurisdiction and venue are proper, and that no procedural default bars the requested relief, I turn now to the merits of petitioner's motion. Gall seeks an order "finding the October 6, 1978 judgment of the Boone Circuit Court to be void, and directing that it be *vacated*." Doc. #185 (emphasis added). Even post-Gentry, this court cannot order a state court to "vacate" a state court conviction. Although the distinctions may seem to reflect semantics more than practical effects, controlling case law distinguishes between the

nullification[2] and/or expungement[3] of a state court conviction by a federal court and the vacatur[4] or reversal[5] of such a conviction. In short, nullification (and corresponding expungement) is permitted; reversal and vacatur are not.

The distinction is one that the respondent acknowledges in this proceeding, but one that the

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[2]"The act of making something void" or "The state or condition of being void." Black's Law Dictionary (8th ed. 2004).

[3]"The removal of a conviction.. from a person's criminal record." Black's Law Dictionary (8th ed.2004).

[4]"The act of annulling or setting aside" or "[a] rule or order by which a proceeding is vacated." Black's Law Dictionary (8th ed. 2004).

[5]"An appellate court's overturning of a lower court's decision." Black's Law Dictionary (8th ed.2004).

Kentucky court failed to draw. In denying relief under *Gentry*, the Kentucky Court of Appeals found Kentucky court failed to draw. In denying relief under *Gentry*, the Kentucky Court of Appeals found significant the fact that this federal court chose not to adopt language tendered by Gall that "vacated" the conviction.

> As *Gentry* makes clear, the federal district court in Gall's case undoubtedly had the authority to order his conviction *vacated*. Furthermore, collateral consequences are presumed to flow from a criminal conviction and need not be pleaded with specificity.
>
> [A]lthough the federal district court undoubtedly had the jurisdiction to order Gall's conviction *vacated*, the record indicates that it chose not to do so. As we have already noted, Gall submitted a proposed order that included a provision *vacating* his conviction. The federal district court rejected the wording of Gall's order and declined to include the provision in its judgment. Gall's subsequent appeal of that district court order never raised this issue, instead focusing exclusively on whether the

> involuntary hospitalization proceeding was mandatory.

Gall, 2007 WL 1575303 at *3 (emphasis added).

However, *Gentry* did not hold that a federal court has the power to *vacate* a state court conviction. Rather, *Gentry* upheld the longstanding principle that when habeas relief is granted by a federal court, "the state court judgment *is neither reversed nor vacated*" but instead "the prisoner is released and the state court judgment authoritatively declared void." *Id.* at 697 (quoting *Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, 277 (4th Cir. 1977))(emphasis added). Only the United States Supreme Court has the authority to *reverse* a state court conviction on direct appeal. *See Smith v. Spina*, 477 F.2d 1140, 1147-48 (3d Cir. 1973).

Gentry made clear that habeas relief implies *nullification* of an unconstitutional conviction rather than reversal. Therefore, *Gentry* reasoned that a lower federal court may later make explicit what is implicit in a grant of habeas relief, and order a state court to expunge a nullified conviction. As explained in this passage from *Gentry*:

> [T]he law is absolutely clear that the writ releases the successful petitioner from the state's custody, and, as we have discussed above, such release includes relief from the conviction's collateral consequences when it was the conviction itself that was found to be unconstitutional. As a practical, logical, and necessary matter, relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively requires expungement of the conviction from the petitioner's record, and expungement of the record implies nullification of the unconstitutional conviction. *See Satterlee v. Wolfenbarger*, 453 F.3d at 370 ("It appears that we have never expressly addressed whether habeas courts have the power to

order the expungement of the record of a conviction. We conclude that they do."); *Ward v. Wolfenbarger*, 340 F. Supp.2d 773, 776 (E.D. Mich. 2004)("A federal district court has the authority, in a habeas corpus proceeding, to order the expungement of a habeas petitioner's criminal records against all persons who maintain custody of such records." (Citations and internal quotation marks omitted). Put another way, a state acts *ultra vires* when it obtains a criminal conviction in violation of the United States Constitution, and *ultra vires* acts bear no legitimate force in a government under the law. A public act without legitimate force is indistinct under the law from an act that never was, or an act that has been voided. Therefore, we hold that the district court acted within its constitutional authority when it nullified the petitioner's unlawful criminal conviction.

In so holding, however, we note that the fact that the writ *nullifies* the criminal conviction does not necessarily *reverse* that conviction, for the writ does not itself generally preclude the Commonwealth from retrying the petitioner if it can otherwise do so lawfully. Nullification is thus akin to a non-prejudicial dismissal. *See Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, 277

> (4th Cir. 1977)("While the state court judgment is neither reversed nor vacated, the prisoner is released and the state court judgment authoritatively declared void. Thereafter, the state court judgment should have no preclusive effect").

Id. at 696-697. Of course in this case, the Commonwealth wa precluded by double jeopardy from retrying Gall on murder charges, so that the issuance of the writ amounted to a nullification which was akin to a dismissal with prejudice.

In *Gentry*, the Sixth Circuit also offered guidance on *when* a federal court should issue an order explicitly nullifyi the state court conviction. There, the petitioner was releasec from imprisonment because she completed her sentence dur the pendency of her habeas proceeding. Following her releas the federal district court granted the writ of habeas corpus, conditioned upon the Commonwealth's ability to conduct a trial. The Commonwealth failed to grant a new trial within t

allotted time. "As there was no need to release Gentry from incarceration, the only action required was to expunge Gentry's record of her unconstitutional felony conviction. The Commonwealth took no such action." *Id.* at 691. Only some time after the Commonwealth failed to expunge the record did Gentry file a "motion to enforce" the prior grant of habeas relief in federal court. The Sixth Circuit clearly approved of the district court's grant of additional relief at this later time. "As it took action only after the Commonwealth had decided, by its inaction, not to provide the petitioner with appropriate relief...the district court did not abuse its discretion by nullifying the Commonwealth's unconstitutional conviction." *Id.* at 697.

The Sixth Circuit rejected the Commonwealth's position in *Gentry* that a successful habeas petitioner who has been

released by a federal court should seek further relief (expungement) in state court:

> Successful habeas petitioners are entitled to the appropriate benefit of the writ, and we cannot require them to exhaust their claims anew in order to receive that benefit. To mandate that a petitioner who has obtained a writ of habeas corpus with respect to her unconstitutional conviction independently challenge the attempted imposition of collateral consequences of her unconstitutional conviction in state judiciaries, either *in toto* or *seriatim*, would, at a minimum, entail a uselessly formal acknowledgment of the states' sovereignty, *for states could not constitutionally enforce those collateral consequences.* Indeed, the Commonwealth itself implicitly acknowledges this problem in that it failed to raise any merits defense of its potential imposition of criminal collateral consequences against Gentry. Even more perniciously, under the Commonwealth's proposal, a less ethical state might find itself able in practice to impose collateral consequences of unlawful convictions when successful habeas petitioners find the task of challenging the attempted imposition of those consequences too onerous or intimidating. But a government under the law simply could not long remain under the law by acting in such a manner. Therefore, we hold that the petitioner is not

> required to exhaust anew her challenge to the collateral consequences of her unconstitutional conviction

Id. at 696 (emphasis added).

Guided by *Gentry*, I recommend that this court now enter an order nullifying and directing expungement of the underlying 1978 conviction. In this case, the grant of the writ was nearly unconditional. Retrial on the original murder charges was not permitted under principles of double jeopardy, but the Commonwealth was permitted to maintain custody in order to institute civil commitment proceedings within a defined period of time. When that lone condition did not occur, the writ was automatically converted to an absolute grant. *See Gentry* at 691. After Gall's release, like in *Gentry*, the only action required was to expunge Gall's record

of his unconstitutional felony conviction. The Commonwealth took no such action. An order by this court nullifying that conviction pursuant to the previous grant of the writ of habeas corpus will correct any

mistaken assumption by the Commonwealth that it may continue to impose collateral consequences arising out of the unconstitutional 1978 conviction.

Although I have concluded that this court should nullify and order the Commonwealth to expunge Gall's conviction under controlling federal law, petitioner Gall asserts that the Commonwealth of Kentucky does not recognize a difference between "vacating" a conviction and "nullifying" it. Petitioner asks for vacatur under Ky.R.Civ.P. 60.02(e), which provides that upon motion a court may relieve a party from its final judgment if that judgment "is void, or has been satisfied, released, or discharged, or the prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The language of Rule 60.02(e) does not support petitioner's claim that there is no distinction between vacatur and nullification, but rather, permits the same relief to be obtained under

state law whether a judgment has been rendered void, reversed, vacated, or satisfied. Nullification renders a conviction void. Because *Gentry* and other federal case law clearly supports only nullification and expungement, that is the relief that will be recommended. *See generally Satterlee v. Wolfenbarger*, 453 F.3d at 370 (affirming order of expungement following state's failure to comply with conditional writ); *Goldy v. Tierney*, 548 F. Supp.2d 422 (E.D. Mich. 2008)(citing *Gentry* and holding expungement required where prisoner previously released); *Eddleman v. McKee*, 2008 WL 186358 (E.D. Mich. Jan 22, 2008)(same, text available on Westlaw).

D. "Broader Issues of Justice"

Citing "broader issues of justice" and stating that the evidence "fully supported" a conviction for manslaughter, the Kentucky Court of Appeals declined to go further than the express terms of the August 15, 2001 order directing Gall's release. Relying on these same "issues of justice," the respondent

repeatedly focuses this court's attention on the gruesome nature of this brutal crime, which involved the kidnaping, rape and murder of an innocent twelve year old girl on her way to school. Referencing Ohio records, the respondent states that Gall currently is serving a life sentence in Ohio for aggravated murder, rape (4 counts), attempted

rape, kidnaping (2 counts), aggravated robbery, and armed robbery. As noted by the respondent, even the Sixth Circuit Court of Appeals, when granting habeas corpus relief,6 made clear that the court had no doubt that Gall had raped and killed Lisa Jansen.

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[6]Ironically, the respondent mistakenly describes the Sixth Circuit's opinion as "*reversing* Gall's murder conviction." Doc. 194 at 12.

> There is little doubt Gall committed the acts in question....
>
> This is indeed a tragic case. The primary tragedy is that a young girl's life was taken in the most cruel

> and grisly fashion. It is also evident that Eugene Gall was the man who cut her life short.

See id 231 F.3d at 277. Later in the opinion, the Sixth Circuit expressed agreement that "the Commonwealth's circumstantial evidence against Gall was 'overwhelming.'" *Id.* at 281. The Sixth Circuit granted the petition for habeas relief primarily because the prosecution failed to prove an essential element of the crime for which Gall was convicted. The Sixth Circuit went on to comment:

> Without that element proved, Gall's conviction would have been for manslaughter pursuant to Ky.Rev.Stat. Ann. § 507.030(1)(b), which carried a maximum jail term of twenty years - a length of time he has already served. Nonetheless, in looking at the trial record, we think that the overwhelming and undisputed evidence of Drs. Chutkow and Toppen was that Gall was not sane at the time he committed the acts in question. Moreover, the evidence clearly showed that Gall's psychotic condition is permanent, and that he would be extremely dangerous to his fellow citizens if released. . ..
>
> With this overwhelming showing of Galls's severe mental illness and his high potential for future dangerousness, we condition the grant of Gall's habeas petition on the state's granting him an

> involuntary hospitalization proceeding, just as he would have been provided if he had been found insane under [the statute requiring such a proceeding for defendants who are acquitted by reason of insanity].

Id. at 335-336.

The respondent argues that "justice does not require nullification of Gall's conviction given the circumstances of his obvious guilt and incarceration on other charges [in Ohio]." Because the Sixth Circuit had "no doubt" that Gall committed the crimes in question and referenced the possibility that Gall might have been convicted of manslaughter, the respondent contends that the imposition of collateral consequences from the otherwise unconstitutional conviction is "just." The respondent makes several somewhat inconsistent arguments: 1) petitioner deserves the imposition of collateral consequences; 2) petitioner fails to show the existence of collateral consequences; and 3) petitioner has so many valid convictions that whatever additional collateral

consequences exist from the unconstitutional conviction add nothing to those legitimately imposed from valid convictions.

The respondent's first argument is anathema to the issuance of the Great Writ. The Commonwealth could have initiated re-trial on a manslaughter charge but chose not to do so for the obvious practical reason that Gall had already served more than the term of imprisonment that could be

imposed for such a conviction.[7] Regardless of its reasons, the Commonwealth can no longer rely on the unconstitutional conviction in order to impose collateral consequences. "[S]tates could not constitutionally enforce ...collateral consequences" when a petitioner has obtained a writ of habeas corpus nullifying an unconstitutional conviction. *Gentry,* 456 F.3d at 696.

The respondent's second argument - that Gall has failed to adequately specify the collateral consequences imposed by the existence of the conviction - likewise was

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[7]Contrary to the Commonwealth's position, it is not a foregone conclusion (and the Sixth Circuit did not hold) that Gall would have been convicted of the lesser offense, given evidence that brought his sanity into question.

rejected in *Gentry* as well as by the Kentucky Court of Appeals in its opinion.

> [T]he law does not require a habeas petitioner to prove by a preponderance of the evidence that she may face collateral consequences of her unconstitutional felony conviction, for the disabilities consequent to a felony conviction are legion, and patently obvious in many cases. Indeed, as we have already noted, the Supreme Court has acknowledged that it has allowed federal courts to presume the existence of collateral consequences "in recent decades." Moreover, ...petitioner has pointed to Kentucky statutes that, on their face and as a matter of law, strip her, as a felon, of certain rights and privileges, including, *inter alia*, the right to vote and certain driving privileges. ...There are also well-known collateral consequences of a felony conviction under federal law of which we take judicial notice. ..

Id. at 694-695 (citations omitted); *see also Gall v. Commonwealth*, 2007 WL 1575303 at *3 ("collateral consequences are presumed to flow from a criminal conviction and need not be pleaded with specificity"). The Sixth Circuit previously held that even following Gall's release from Kentucky's custody, "collateral consequences still

exist, and ...a case or controversy exists with respect to whether this court's earlier opinion and judgment were fulfilled." *Gall v. Scroggy*, 69 Fed. Appx. 251, 253, 2003 WL 2139880 (6th Cir. 2003). Finally, Gall has alleged that he suffers or will suffer from specific collateral consequences in Ohio resulting from his unlawful Kentucky conviction including improper considerations of his record when determining eligibility for parole, and his current and future treatment/placement in the Ohio system. *Compare Ward v. Wolfenbarger*, 340 F. Supp.2d 772, 776 (E.D. Mich. 2004)(ordering expungement of criminal records of constitutionally invalid convictions despite expiration of sentence, where convictions could be considered on parole for unrelated conviction).

The respondent's third argument -that the imposition of collateral consequences from the unconstitutional conviction is redundant to those arising out of Gall's remaining convictions - also fails to persuade. Certainly, a possibility exists that relief from

collateral consequences arising out of the nullified murder conviction will have no real or tangible effect on Gall due to the existence of other legitimate convictions.[8] However, the United States Supreme Court has rejected the argument that this pragmatic approach should be used to deny relief. *See Sibron v. New York*, 392 U.S. 40, 56, 88 S.Ct. 1889, 1899 (1968)(finding "no relevance in the fact that Sibron is a multiple offender" based in part upon the inability to predict whether other

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[8] That said, this court cannot help but express some chagrin at the enormity of resources marshaled by the Commonwealth in opposition to petitioner's ongoing quest to have his unconstitutional conviction declared to be void. If no collateral consequences exist, and/or that any such consequences are redundant given the existence of other valid convictions, there would be little reason to continue the fight against the relief sought herein.

convictions could be set aside in the future). Although *Sibron* involved a direct appeal, appellate and district courts in four other Circuits have applied its reasoning to the habeas context, at least when resolving issues of mootness as opposed to the "in custody" requirement. *See e.g., Murray v. Wainwright*, 450 F.2d 465, 468 (5th Cir. 1971)(multiple offender status irrelevant); *Harrison v. Indiana*, 597 F.2d 115, 118 (7th Cir. 1979)(same); *Valez v. People of State of New York*, 941 F. Supp. 300, 308-309 (E.D.N.Y. 1996)(same); *see also Larche v. Simons*, 53 F.3d 1068, 1071 (9th Cir. 1995)(adhering to 9th Circuit precedent requiring presumption of collateral consequences, but criticizing the possibility of a "cheapen[ing]" of the writ).

In a split decision, only the Eleventh Circuit in *Malloy v. Purv* 681 F.2d 736 11th Circuit 1982) appears to have taken a different approach. In that case, the majority reasoned that where a petitioner's multiple offender status has caused the forfeiture of civil liberties and

the petitioner concedes that he cannot point to any actual harms arising from the challenged conviction, *Sibron* does not require the state to prove the absence of additional collateral consequences and the case is moot.

> We interpret *Sibron* simply to mean that the state must show that no possibilities exist for the imposition of collateral legal consequences on the basis of the challenged conviction. Because all the civil liberties cited by Malloy were previously forfeited, the state had nothing to prove.

Id. at 739; *but see* Wisdom, J., *id.* at 740 ("I read *Sibron*...as holding that a defendant's prior convictions are irrelevant to the question of collateral consequences)(specially concurring).

The parties have not cited and this court has not located any Sixth Circuit case law which addresses the issue of whether a petitioner's multiple offender status can render moot a motion to enforce the absolute grant of a writ of habeas corpus. I conclude based upon *Sibron* and the cited decisions from the Fifth, Seventh,

Ninth and the Second Circuits that the Sixth Circuit would hold that a petitioner's multiple offender status does not render such a motion moot. In the alternative, I find the Eleventh Circuit's approach in *Malloy* to be distinguishable given that the petitioner here has specifically pleaded collateral consequences linked to this particular conviction, and that the Sixth Circuit has previously held in this case that collateral consequences exist.

III. Conclusion and Recommendation

For the reasons stated herein, **IT IS RECOMMENDED THAT** petitioner's motion to enforce the judgment of the Sixth Circuit and this court's previous grant of the writ of habeas corpus [Doc. 185] be **granted**, and that the district court enter an order forthwith **nullifying** the unconstitutional 1978 conviction and requiring the Commonwealth of Kentucky to expunge the same conviction from its records.

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of the date of service of the same or further appeal is waived. *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005); *Thomas v. Arn*, 474 U.S. 140 (1985). Poorly drafted objections, general objections or objections that require a judge's interpretation should be afforded no effect and are insufficient to preserve the right of appeal. *See Howard v. Secretary of Health and Human Services*, 932 F.2d 505, 509 (6th Cir. 1991). A party may file a response to another party's objections within ten (10) days after being served with a copy. Fed. R. Civ. P 72(b).

This 15th day of October, 2008.

Signed By:
s/ J. Gregory Wehrman
United States Magistrate Judge

RENDERED: JUNE 1, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000112-MR

EUGENE WILLIAMS GALL JR. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE STEVEN JAEGER, JUDGE
ACTION NO. 78-CR-00097

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE. PAISLEY, SENIOR JUDGE: Eugene Gall appeals from an order of the Boone Circuit Court which denied his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. At issue is whether the circuit court abused its discretion in refusing to vacate Gall's October 6, 1978, murder conviction after a federal district court granted his petition for habeas corpus but gave no explicit directive to vacate the conviction.

This case has a lengthy procedural history. In 1978, Gall was convicted by a jury of the gruesome murder of Lisa Jansen, a twelve-year-old girl, and sentenced to death. His conviction and sentence were affirmed by the Kentucky Supreme Court. *See Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980) *cert. denied Gall v.*

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[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kentucky, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 824 (1981). The Kentucky Supreme Court also affirmed the trial court's denial of his subsequent motion for post-conviction relief made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

In July 1986, Gall sought habeas corpus relief in the United States District Court, Eastern District of Kentucky. *See* 28 U.S.C. § 2254. The district court denied his petition. He thereafter filed an appeal in the Court of Appeals for the Sixth Circuit on April 18, 1991. In a lengthy opinion, filed on October 30, 2000, the Court of Appeals reversed the district court's denial of habeas relief and remanded the case. *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000).

The primary ground for reversal was the federal appellate court's determination that the Commonwealth had failed to provide sufficient evidence of one of the elements of murder: the absence of extreme emotional disturbance. The court repeatedly

stressed that there was "little doubt" that Gall had indeed committed the act of killing the child. "Instead, the central issue contested at trial was his mental state at the time of the killing." *Id.* at 277. The circumstantial evidence against Gall was described as "overwhelming," and the case was described as a "tragedy" in which "a young girl's life was taken in the most cruel and grisly fashion. It is also evident that Eugene Gall was the man who cut her life short." *Id.*

Nonetheless, under the operation of double jeopardy, Gall could not be retried for murder.

> [D]ouble jeopardy prevents us from ordering a retrial of this case – the prosecution already had one attempt to make its case for murder, and, as explained above, failed to prove an essential element.
> *Id.* at 335-36.

The court expressed grave concerns about the potential consequences of releasing Gall, describing him as "severely mentally ill and highly dangerous" and commenting that "the

evidence clearly showed that Gall's psychotic condition is permanent, and that he would be extremely dangerous to his fellow citizens if released into free society." *Id.* at 336. The court therefore granted the Commonwealth an opportunity to conduct an involuntary hospitalization proceeding prior to Gall's release.

On remand, Gall moved the federal district court to enter a judgment implementing the appellate court's opinion and judgment. He tendered a proposed order with his motion which contained the following provision:

> Petitioner's conviction for murder and sentence of death, pursuant to the October 6, 1978 Final Judgment of the Boone Circuit Court, Indictment No. 78-CR-097, are unconstitutional and are VACATED[.]

It is highly significant for purposes of the present appeal that the district court chose **not** to include this language in its order granting habeas relief to Gall. Instead, its judgment of August 15, 2001, stated as follows:

> Pursuant to the opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued in this case on October 30, 2000, the petition for writ of habeas corpus under 28 U.S.C. Section 2254 regarding the petitioner's judgment of conviction for the murder of Lisa Jansen in the Circuit Court of Boone County, Kentucky, is hereby GRANTED, and the Commonwealth of Kentucky shall discharge petitioner from custody under that judgment within ninety(90) days of the entry of judgment in this case.
>
> The petitioner's release from state custody under that judgment is subject to the condition that the Commonwealth of Kentucky may retain custody of petitioner for an additional 30 days hereafter if it elects to initiate civil commitment proceedings against the petitioner under KRS Chapter 202A within that time.

The Commonwealth chose not to conduct involuntary hospitalization proceedings. Gall was released from custody in Kentucky and extradicted to Ohio to serve sentences for rape, attempted rape, and aggravated robbery convictions. He appealed the district court judgment, arguing that the opinion of the appellate court had mandated an involuntary hospitalization proceeding. On

appeal, the Sixth Circuit Court of Appeals affirmed the judgment of the district court, ruling that it had not directed that the state **must** provide Gall with an involuntary commitment proceeding. *See Gall v. Scroggy*, 69 Fed.Appx. 251, 254 (6th Cir. 2003) (*unpublished*).

Gall filed the motion which is the subject of the present appeal in Boone Circuit Court on May 18, 2004. Gall argued that his judgment of conviction had to be vacated in order to comport with the ruling of the Sixth Circuit Court of Appeals. Relying on *Fay v. Noia*, 372 U.S.391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the Commonwealth contended that while a federal habeas court had the power to order the release of a prisoner, it did not have the power to order the alteration of a state court judgment. After conducting a hearing, the circuit court denied Gall's motion on August 23, 2005, and this appeal followed.

CR 60.02(e) permits a court to relieve a party from its final judgment, on the grounds that:

> the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]

Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky.1959).

Gall argues that the scope of federal habeas corpus relief extends beyond release from custody to encompass other, broader forms of relief, "as law and justice require." 28 U.S.C.A. § 2243. He contends that his conviction and sentence in Kentucky were obtained in violation of his constitutional rights, and that although he has been released from custody in Kentucky, he continues to suffer from collateral consequences of his conviction which affect his treatment and placement while incarcerated in Ohio.

The Commonwealth argues that the federal district court did not possess the authority to vacate Gall's conviction, and that Gall had failed to plead the issue of the collateral consequences with sufficient specificity .

Both Gall and the Commonwealth have grappled with the implications of a recent Sixth Circuit case, *Gentry v. Deuth*, 456 F.3d 687 (6th Cir. 2006) *cert. denied* 127 S.Ct. 838, 166 L.Ed.2d 667 (2006), which delineates the parameters of federal jurisdiction in habeas corpus proceedings. Gentry, the defendant, was granted a conditional writ of habeas corpus, permitting the Commonwealth to retry her on various criminal charges. While her petition was pending she was released from prison. She thereafter filed a motion asking the federal district court to enforce its judgment by voiding her conviction so that she would not face any collateral consequences (such as the loss of the right to vote, hold public office and serve on a jury) as a result of having been convicted of a

felony. The district court granted her motion and the Commonwealth appealed. The Sixth Circuit held that the district court possessed jurisdiction over Gentry's motion to enforce, and that it possessed the authority to nullify her conviction.

As *Gentry* makes clear, the federal district court in Gall's case undoubtedly had the authority to order his conviction vacated. Furthermore, collateral consequences are presumed to flow from a criminal conviction and need not be pleaded with specificity.

However, although the federal district court undoubtedly had the jurisdiction to order Gall's conviction vacated, the record indicates that it chose not to do so. As we have already noted, Gall submitted a proposed order that included a provision vacating his conviction. The federal district court rejected the wording of Gall's order and declined to include the provision in its judgment. Gall's subsequent appeal of that district court order never raised

this issue, instead focusing exclusively on whether the involuntary hospitalization proceeding was mandatory.

We have not been made aware of any authority supporting the proposition that state courts must go **beyond** the express orders of federal courts when granting relief under the writ of habeas corpus. It was not an abuse of discretion for the circuit court to choose to remain within the specific confines of the federal district court order.

Gall has also argued that if his conviction is not vacated, the Commonwealth will in effect be acting ultra vires by obtaining a criminal conviction in violation of our Constitution, thereby necessitating further intervention by the federal court. As we have explained, however, the circuit court followed the specific directive issuing from the federal court – this is clearly distinguishable from the situation in *Gentry* where the Commonwealth appealed a **federal** order nullifying a conviction.

There is no federal judgment in existence ordering the nullification of Gall's conviction. There are also broader issues of justice at play here. The Sixth Circuit Court of Appeals reversed the denial of Gall's petition with some reluctance, due to safety concerns. In its discussion, the Court observed that Gall could not be kept incarcerated in Kentucky because he had already served the sentence for the lesser-included offense of manslaughter:

> Without that element [absence of extreme emotional disturbance] proved, **Gall's conviction would have been for manslaughter** pursuant to Ky.Rev.Stat.Ann. § 507.030(1)(b), which carried a maximum jail term of twenty years – a length of time he has already served.

If our state court vacates Gall's conviction for murder, he would in effect be relieved of all collateral consequences, including those he would have suffered under a manslaughter conviction – a conviction which the federal court found **was** fully supported by the evidence offered at his trial. Under the terms of

CR 60.02, "a court may, **upon such terms as are just**, relieve a party or his legal representative from its final judgment[.]" We are not persuaded that the circuit court erred in determining that such a result would not be just in this case.

For the foregoing reasons, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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